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No. _____

In The
Supreme Court of the United States

LUFKIN INDUSTRIES, INC.,
Petitioner,

v.

SYLVESTER MCCLAIN, ON HIS OWN BEHALF AND ON BEHALF OF A CLASS OF SIMILARLY SITUATED PERSONS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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July, 2008

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QUESTIONS PRESENTED FOR REVIEW

I. Whether § 703(h) of Title VII of the Civil Rights Act of 1964 permits disparate effect in promotions undisputedly awarded by seniority and without intent to discriminate to be used in establishing unlawful disparate impact under the not-capable-of-separation-for-analysis method added to Title VII by the Civil Rights Act of 1991.

II. Whether the Fifth Circuit's decision imposing a liability period for a Title VII class claim beginning almost three years before the charge that the Court of Appeals found exhausted the administrative remedies for the class was filed conflicts with this Court's decisions negating liability for acts outside the Title VII limitations period.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed below.

Petitioner: LUFKIN INDUSTRIES, INC.

Respondents: SYLVESTER MCCLAIN, on his own behalf and on behalf of a class of similarly situated persons; BUFORD THOMAS, on his own behalf and on behalf of a class of similarly situated persons; PATRICK ROSS, on his own behalf and on behalf of a class of similarly situated persons; MARY THOMAS, on her own behalf and on behalf of a class of similarly situated persons; EDDIE K. MASK, on his own behalf and on behalf of a class of similarly situated persons; LEROY GARNER, on his own behalf and on behalf of a class of similarly situated persons; SHERRY CALLOWAY SWINT, on her own behalf and on behalf of a class of similarly situated persons; WALTER BUTLER, on his own behalf and on behalf of a class of similarly situated persons; also known as A; FLORINE THOMPSON, on her own behalf and on behalf of a class of similarly situated persons; CLARENCE OWENS, on his own behalf and on behalf of a class of similarly situated persons; also known as C; CLIFFORD R. DUIRDEN, on his own behalf and on behalf of a class of similarly situated persons; EARL POTTS, on his own behalf and on behalf of a class of similarly situated persons; ROALD MARK, on his own behalf and on behalf of a class of similarly situated persons.

RULE 29.6 STATEMENT

Lufkin Industries, Inc. has no parent company and no publicly held corporation owns 10% or more of Lufkin Industries stock.

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Lufkin Industries, Inc. ("Lufkin") respectfully prays that a writ of certiorari issue to review a final judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 519 F.3d 264 (5th Cir. 2008), and is reproduced in the Appendix ("Pet. App.") at 1a. Plaintiffs and Lufkin timely petitioned for a rehearing. The Court of Appeals Order denying plaintiffs' and Lufkin's petitions is reproduced at Pet. App. 83a. The district court's Amended Final Judgment is reproduced at Pet. App. 37a.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(4) and 42 U.S.C. § 2000e-5(f)(3). The Court of Appeals panel issued its Revised Opinion on March 10, 2008. Plaintiffs and Lufkin each timely petitioned for rehearing. The panel denied rehearing on April 4, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) (hereinafter § 703(h)):

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or

> different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

Section 105(a) of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k)(1)(B)(i):

> With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

STATEMENT OF THE CASE

Plaintiffs are former and current black employees working at Lufkin's production operations and corporate office in Angelina County, Texas. Originally asserting an across-the-board class action, plaintiffs alleged class-wide unlawful race discrimination under both disparate treatment and disparate impact theories of liability.

The district court (Cobb, J.) dismissed plaintiffs' disparate treatment claims, but certified plaintiffs' disparate impact claims for the following class:

> All Black persons employed for any period of time by defendant Lufkin Industries on or after March 6, 1994, to date, whose compensation, remuneration, benefits, job assignments, promotional opportunities, career advancement and other terms and conditions of employment have been, may have been, or may become, adversely affected by defendant Lufkin Industries' past or present systems of administering hiring, wages, salaries, job assignments, training, evaluations, promotions, demotions, terminations, layoffs, recalls, and rehires.

McClain v. Lufkin Indus., Inc., 187 F.R.D. 267, 277-78 (E.D. Tex. 1999).

During the class period certified by the district court, Lufkin maintained four production divisions in Angelina County: Foundry, which produced metal castings; Trailer, which produced trailer truck bodies; Oilfield, which manufactured and repaired oil pumping units; and Power Transmission, which machined high tolerance heavy industrial gearing. Hourly employees in Lufkin's production divisions have been represented for more than fifty years by the AFL-CIO which delegates its collective bargaining responsibilities for Foundry to the Glass, Molder, Pottery, Plastics and Allied Workers Union, Local No. 429 ("GMP"); for the Oilfield machine shop and Power Transmission to the International Association

of Machinists and Aerospace Workers, Local No. 1999 ("IAM"); and for the Oilfield fabrication shop and Trailer to the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local No. 587 ("Boilermakers"). Lufkin and the unions have a single collective bargaining agreement for hourly employees in Angelina County.

The collective bargaining agreement recognizes plant and departmental seniority, with department seniority defined as the length of continuous service in the following departments computed from the date on which an employee went to work in said department: foundry department, pattern shop department, trailer division, fabrication department, machine shop department, and gear repair department. During the class period, the collective bargaining agreement provided:

> Departmental seniority within the bargaining unit shall govern in promotions or demotions within a department, and in reduction of forces within the several departments; and, when forces are increased, employees who have been laid off in a particular department, shall be recalled in the inverse order of their layoffs; provided, said employees shall have departmental seniority status in accordance with the provision of this Article 22; and provided, also, that in the case of promotions, demotions, transfers, layoffs and recalling to work of employees laid off, all as above set out, their departmental seniority shall govern if their ability to perform the work is

> approximately equal. "Ability" as the term is used in the phrase "ability to perform" shall be understood to include the employee's capacity to perform the work, to which they are assigned, with efficiency equal to that of other employees under consideration, and with the same, or equivalent, tools or equipment, which at the time, are customarily available to such employees for their performance of such work. The determination of an employee's ability to perform the work is a function of management; however, in the event an employee is dissatisfied with the company's determination of their ability to perform the work, such dissatisfaction may be made the subject of a grievance. Any employee transferred from one department to another department shall have their seniority frozen in their former department; and shall begin accumulating seniority in the department to which they are transferred.

Most hourly jobs are posted and as the Fifth Circuit noted, "[u]nder the [collective bargaining agreement], the company must post bid sheets for each new hourly opening. Seniority is the main criterion for promotion." Pet. App. at 14a. Lufkin's promotion process for posted hourly jobs is generally summarized:

- Any employee may apply for the job (that is, sign the bid sheet);

- To be eligible, the employee must be seeking a promotion (that is, a higher rated job) and not

be disqualified because of plant rule violations or, in the foundry department, because they are in the attendance control program;

- For most hourly promotions, the process ends here with the senior bidder seeking a promotion being promoted; or, if the senior bidder declines, the next senior eligible bidder is promoted; and

- For some jobs, the employee must also establish job-related ability (that is, pass a paper and pencil test or skill demonstration) and the senior bidder passing the test or skill demonstration is promoted.

The district court found that in hourly jobs, "[s]eniority is the main criterion, but ability is also a necessary qualification." Pet. App. at 43a. The district court further determined:

> Although seniority is the paramount qualification listed in the CBA, Lufkin has established several other rules which affect promotions. For some positions, Lufkin requires an "objective" test that generally involves a demonstration of basic math, literacy, and competence with the relevant machinery. Some of the criteria are objectively verifiable, such as math skills or reading ability. Other criteria are left to the satisfaction of individual managers.
>
> To ensure that competent workers occupy all positions, the company has also inserted an "ability" clause in the CBA that allows Lufkin to

> fill positions on the basis of ability and regardless of seniority. The ability clause appears to trump all other considerations.

Id. at 43a-44a.

Two claims went to trial: discrimination against blacks in assignment of newly hired employees; and racially discriminatory promotion practices that rested on largely subjective decision-making criteria carried out by a largely white supervisory core. Pet. App. at 4a. Plaintiffs' disparate impact promotion analysis, which concluded there was a statistically significant shortfall in black promotions, included numerous promotions that contributed to the statistical shortfall in black promotions, even though these jobs were indisputably awarded to the most senior candidate. *Id.* at 19a. The district court entered judgment for plaintiffs on each claim.

Plaintiffs conceded that Lufkin's use of departmental seniority was a bona fide seniority system. Neither the district court nor the Fifth Circuit made any finding that Lufkin's seniority system was not bona fide or that Lufkin's seniority system resulted from an intention to discriminate because of race.

On appeal, the Fifth Circuit reversed and vacated the district court's judgment as to the initial assignment claim but affirmed the judgment on the promotion claim. *Id.* at 33a. Addressing whether plaintiffs had exhausted administrative remedies, the Fifth Circuit found, contrary to the district court's finding, that the letter filed by Sylvester McClain in January 1995 (which the district court accepted as the

equivalent of a charge) would not support either of the class claims. It did, however, find that a later-filed charge, filed on February 24, 1997 by Buford Thomas, would support the class promotion claims. Nevertheless, the Fifth Circuit accepted promotions made outside the limitations period set by the Thomas charge to support the liability findings and directed the district court on remand to compute back pay on the shortfall of promotions beginning from March 6, 1994, the date of limitations established by the earlier McClain charge. *Compare id.* at 21a with 26a.

Affirming plaintiffs' promotion claim, the Fifth Circuit determined that the district court's finding of subjective decision making in Lufkin's promotion system was not clearly erroneous, *id.* at 17a, and that Lufkin's promotion process was not capable of separation for analysis under 42 U.S.C. § 2000e-2(k)(1)(B)(i). *Id.* at 19a.

Critical to the first question presented for review was the Fifth Circuit's opinion on this latter issue –

> Lufkin argues, for example, that the plaintiffs' expert could have separated the challenged employment practices from its legitimate seniority system. The expert included in his analysis numerous promotions that contributed to the statistical shortfall in black promotions, even though these jobs were indisputably awarded to the most senior candidate. This argument ignores the district court's finding that Lufkin affords management considerable discretion in deciding whether to follow seniority in promotions. Plaintiffs could not

> statistically analyze the actual practice they challenge—subjective and discretionary application of the seniority provisions—by excluding promotion based on seniority. Seniority, the court found, was likely to have been irrelevant to the promotion.

Id.

Neither the district court nor the Fifth Circuit explicitly addressed § 703(h), which Lufkin argued insulated seniority-based promotions from the disparate impact claim. *See, e.g.*, Defendant's Pre-Trial Proposed Findings of Fact and Conclusions of Law (Docket No. 268) at ¶¶ 206-211; Lufkin Industries' Brief of Appellee/Cross-Appellant at 35-36.

REASONS FOR GRANTING THE PETITION

I. SECTION 703(h) OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 DOES NOT PERMIT DISPARATE EFFECT IN PROMOTIONS UNDISPUTEDLY AWARDED BY SENIORITY AND WITHOUT INTENT TO DISCRIMINATE TO BE USED IN ESTABLISHING UNLAWFUL DISPARATE IMPACT UNDER THE NOT-CAPABLE-OF-SEPARATION-FOR-ANALYSIS METHOD ADDED TO TITLE VII BY THE CIVIL RIGHTS ACT OF 1991.

The tension created when the use of seniority has a disparate effect in the workplace is of such critical importance that this Court addressed the proper application of § 703(h) eight times before passage of the Civil Rights Act of 1991 – *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); *International*

Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *California Brewers Ass'n v. Bryant*, 444 U.S. 598 (1980); *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); and *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989). Supreme Court review is again required because the Fifth Circuit's decision ignores the special treatment Congress provided bona fide seniority systems by requiring the disparate effect of undisputed seniority-based promotions be counted in the "not capable of separation for analysis" method of disparate impact proof created by the Civil Rights Act of 1991. As this Court has often decided, without intent to discriminate, seniority-based promotions cannot give rise to unlawful disparate impact notwithstanding that such promotions have a disparate effect. The Fifth Circuit's use of the Civil Rights Act of 1991 to repudiate this principle reverses the balance Congress carefully struck in favor of seniority systems, undermines this Court's opinions protecting that congressional intent, and threatens to disrupt collective bargaining on seniority which is a foundation of our national labor policy.

A. By Permitting Lawful, Seniority-Based Promotions to Create Unlawful Disparate Impact, the Fifth Circuit Interferes With the Collective Bargaining Process and Threatens the Recognition of Seniority in Awarding Competitive Benefits.

The Fifth Circuit determined that promotions indisputably awarded to the bidder with greatest

departmental seniority must be included in a not-capable-of-separation-for-analysis disparate impact claim whenever the employer has discretion to award promotions based on other criteria even though it demonstrably did not. This decision has far-reaching consequences for collective bargaining. Many collective bargaining agreements that recognize and apply seniority routinely also condition eligibility for promotion on other criteria such as minimum qualifications, educational requirements, or ability determinations through testing or skill demonstrations, with such decisions often made at the discretion of the employer. National labor policy favors minimal intrusion into the negotiating process, allowing unions and employers flexibility in reaching agreement with respect to seniority. *See, e.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937) ("The theory of the [National Labor Relations] Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel."); *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 401-02 (1952) (explaining that the NLRA, while encouraging the making of voluntary agreements, does not compel agreement between unions and employers or regulate the substantive terms of any agreement reached). The Fifth Circuit's opinion, however, will undoubtedly intrude upon the bargaining process as employers and unions grapple with a holding that seniority-based promotions can now create disparate impact liability under § 2000e-2(k)(1)(B)(i).

This Court has previously acknowledged that seniority is universally recognized in collective bargaining agreements. *Trans World Airlines v. Hardison*, 432 U.S. at 79. In 1995, in 67% of collective bargaining agreements nationwide, seniority was given a role in determining promotions, but was the sole factor in promotions in only 5% of contracts. *Basic Patterns in Union Contracts*, Bureau of National Affairs, 46 (14th ed. 1995). In 49% of collective bargaining agreements, seniority was the determining factor assuming that a job applicant was qualified for the available job. *Id.* From this data, it is clear that the collective bargaining process throughout the nation and in most industries fashions agreements in which seniority is an important factor but not the exclusive basis on which competitive benefits such as promotional opportunities are awarded.

Under the Fifth Circuit's formulation, however, simply because a collective bargaining agreement permits the employer discretion in applying factors other than seniority in the decision-making process, the collective bargaining agreement's seniority-based benefits would no longer be protected from disparate impact analysis. Section 703(h), meticulously crafted by Congress, was intended to balance the occasional conflict between our national policy to eliminate discrimination in employment and our national policy favoring minimal supervision over the substantive terms of collective bargaining. *Am. Tobacco v. Patterson*, 456 U.S. at 76-77; *see Cal. Brewers v. Bryant*, 444 U.S. at 608 ("Congress passed the Civil Rights Act of 1964 against the backdrop of this nation's longstanding labor policy of leaving to the chosen representatives of employers and employees

the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment. It does not behoove a court to second-guess either that process or its products.") (citation omitted). It did so by declaring that in the absence of intent to discriminate Title VII would allow the existence of a disparate effect arising from the allocation of competitive benefits by seniority. *See Am. Tobacco v. Patterson*, 456 U.S. at 75-77; *Int'l Bhd. of Teamsters v. United States*, 431 U.S. at 352 ("[T]he unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII.").

By allowing plaintiffs to prove disparate impact using "numerous promotions that contributed to the statistical shortfall in black promotions, even though these jobs were indisputably awarded to the most senior candidate," Pet. App. at 19a, the Fifth Circuit permits conduct made lawful by § 703(h) to contribute to, and perhaps produce, a disparate impact sufficient to establish unlawful conduct.[1] Using the not-capable-of-separation-for-analysis model added to Title VII in the Civil Rights Act of 1991, the Fifth Circuit adopts a methodology that allows seniority systems to be attacked solely on disparate impact grounds without

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[1] In its recital of the evidence, the Court of Appeals further noted that "Plaintiffs presented additional evidence that approximately half of all promotions were not awarded to the most senior bidder." *Id.* at 14a. Of course, the logical inference from such a finding is that the other half of the promotions were awarded to the most senior bidder and that plaintiffs could determine when this occurred.

any showing of discriminatory intent. As a result, back pay compensation is due for promotions undisputedly awarded to the most senior bidder. Confronted with such back pay liability, and the spectre of a prohibitory injunction for such conduct, Lufkin, as would any other employer, will certainly change its position on seniority in collective bargaining either to avoid additional back pay from a continuing disparate effect or to comply with the ordered injunctive relief. *See Am. Tobacco v. Patterson*, 456 U.S. at 70 ("An adequate remedy for adopting a discriminatory seniority system would very likely include an injunction against the future application of the system and back pay awards for those harmed by its application.").

The impact of the decision, however, is more pernicious. The Fifth Circuit's decision, or new litigation prompted by the opportunity to create disparate impact from seniority-based decisions, will compel employers to re-evaluate their use of seniority systems to award benefits and thereby impinges on the freedom to bargain § 703(h) was meant to protect. *Cf. Id.* at 71 (rejecting EEOC theory that would discourage unions and employers from modifying pre-Act seniority systems as infringing on contractual freedom). The harm is significant. "Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts." *Trans World Airlines v. Hardison*, 432 U.S. at 79. Seniority provisions are of overriding importance in collective bargaining. *Humphrey v. Moore*, 375 U.S. 335, 346 (1964). Because seniority issues are both

commonplace and critical to collective bargaining, the Fifth Circuit decision threatens to alter on a broad scale the balance so carefully crafted by Congress to alleviate the tension between the two most important statutory schemes regulating the nation's workplaces – the National Labor Relations Act and Title VII of the Civil Rights Act. *See Am. Tobacco v. Patterson*, 456 U.S. at 77 ("Section 703(h) represents the balance Congress struck between the two policies, and it is not this Court's function to upset that balance.").

B. In Favoring the Application of the Not-Capable-of-Separation-For-Analysis Method of Proof Over Seniority Systems, the Fifth Circuit Seriously Misapprehends the Breadth of § 703(h).

The Fifth Circuit erred in two fundamental ways. First, it did not address § 703(h)'s plain command that it shall not be an unlawful employment practice for an employer to apply different terms or conditions of employment pursuant to a bona fide seniority system. Section 703(h) provides:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result

> of an intention to discriminate because of race, color, religion, sex, or national origin, ...

42 U.S.C. § 2000e-2(h).

Section 703(h) delineates which employment practices are illegal and thereby prohibited and which are not. *Franks v. Bowman Transp.*, 424 U.S. at 758. A disparate effect among black and white employees that results from a seniority system is not an unlawful employment practice unless it is the product of an intent to discriminate. *Pullman-Standard v. Swint*, 456 U.S. at 289; *see also Lorance v. AT&T Techs.*, 490 U.S. at 908 (proof of discriminatory intent is a necessary element of Title VII actions challenging seniority systems); *Am. Tobacco v. Patterson,* 456 U.S. at 65 ("Under 703(h), the fact that a seniority system has a discriminatory impact is not alone sufficient to invalidate the system; actual intent to discriminate must be proved."). Simply put, it was the intent of Congress that promotion by seniority is lawful, notwithstanding any disparate effect. In counting the discriminatory effect arising from seniority-based promotions to establish statistically significant disparate impact, the Fifth Circuit improperly used the effects of conduct that Congress specifically and carefully pronounced to be lawful to establish unlawful discriminatory impact. In so doing, it rendered lawful conduct unlawful and punished Lufkin for decisions expressly declared lawful by § 703(h). *See Trans World Airlines v. Hardison*, 432 U.S. at 82.

The damage thus done is most easily illustrated in the Fifth Circuit's remand on class-wide back pay. On remand, the Fifth Circuit directed, "the district court

will be dealing solely with damages attributable to approximately 127 lost promotions in hourly pay grades," and shall "compute the total additional wages attributable each year to each promotion and divide the value among the class members." Pet. App. at 26a. Notwithstanding that the Fifth Circuit found that a certain number of those 127 lost promotions were indisputably awarded to the senior bidder, it has directed that Lufkin pay back pay attributable to such promotions. The imposition of a back pay award to promotions made by seniority is contrary to § 703(h). *See Trans World Airlines v. Hardison*, 432 U.S. at 82 ("The Court of Appeals' conclusion that TWA was not limited by the terms of its seniority system was in substance nothing more than a ruling that operation of the seniority system was itself an unlawful employment practice even though no discriminatory purpose had been shown. That ruling is plainly inconsistent with the dictates of § 703(h), both on its face and as interpreted in the recent decisions of this Court."). Moreover, although the Fifth Circuit recognized that it will be "especially difficult to craft an adequate remedial order that will eliminate discrimination without hobbling Lufkin's legitimate promotion policies," Pet. App. at 31a, presumably the district court will be required to enter injunctive relief to cure the disparate impact found including that arising from those promotions that were awarded based on seniority. *See Am. Tobacco v. Patterson*, 456 U.S. at 70.

The Fifth Circuit's error was to combine promotion decisions in which Lufkin did not exercise its subjective judgment or discretion (with promotion proceeding strictly by seniority) with decisions in

which Lufkin exercised subjective judgment and discretion and promoted individuals notwithstanding their seniority. Permitting plaintiffs to challenge the subjective and discretionary application of the seniority provisions by statistically analyzing all promotions, including those based on seniority, does by indirection what § 703(h) forbids. Under the vast majority of collective-bargaining agreements, to deprive seniority-based promotions of § 703(h) protection because the employer may have relied – but did not – on subjective and discretionary criteria treats the employer as if § 703(h) were not in the statute.

The Court of Appeals' ruling thus eviscerates the protection Congress afforded seniority systems. By counting the shortfall in expected black promotions where the actual basis for decision was departmental seniority, the Fifth Circuit permits a finding of unlawful disparate impact to flow directly from, and be significantly produced by, the lawful disparate effect of seniority. To justify this result by stating that the employer *could have* exercised its discretion to select based on some other subjective criteria cannot overcome the special treatment afforded seniority systems by Title VII.

Second, the Fifth Circuit's decision does not recognize the primacy of § 703(h) over the more recently enacted § 2000e-2(k)(1)(B)(i). Section 703(h) begins, "Notwithstanding any other provision of this subchapter," an admonition that requires the subordination of the not-capable-of-separation-for-analysis method of disparate impact proof to the application of seniority systems. The Fifth Circuit's decision which mandates the inclusion of seniority-

based promotions in establishing disparate impact under the not-capable-of-separation-for-analysis methodology effectively makes the subordination clause meaningless. Because Lufkin did, in fact, *apply* its seniority system in making certain promotions, the subordination clause precludes using those seniority-based promotions to create unlawful conduct.

The Fifth Circuit's failure to respect the subordination clause in its application of the not-capable-of-separation-for-analysis provision is particularly troubling in light of its recognition that evidence indisputably established that numerous promotions were based on seniority. Under the guise of the district court's determination that Lufkin could exercise subjectivity and discretion in promotions, although it did not in fact do so in approximately 50% of the promotions, the Court of Appeals has transformed § 2000e-2(k)(1)(B)(i) into an examination of the cumulative effect of Lufkin's application of various criteria in the promotion process, rather than limiting its application to functionally-integrated practices that cannot, as an evidentiary matter, be separated so as to permit independent analysis of each factor. This was not what Congress intended in enacting Section 105(a) of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k).

Supreme Court precedent pre-dating the 1991 Amendments requires that plaintiffs identify the specific employment practice that they challenge and establish that practice as responsible for statistical disparities. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988) (O'Connor, J. plurality opinion) ("[E]specially in cases where an employer combines

subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-57 (1989) (precluding disparate impact liability based on showing of racial imbalance "at the bottom line" and requiring plaintiff to demonstrate that the application of a specific employment practice has created the disparate impact under attack). An earlier version of the 1991 amendment, H.R. 1, provided for disparate impact resulting from the cumulative effect of a group of employment practices, departing from the requirement of identifying and isolating the particular responsible practice. H.R. 1, 102d Cong. § 4 (1991) (providing an unlawful employment practice is established where a complaining party demonstrates that a "group of employment practices" results in a disparate impact); *see also* H.R. REP. NO. 102-40(I) at 30-31, 41-42 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 568-69, 579-80. This bill was not enacted and the particular provision for a cumulative effect disparate impact was not passed. Rather, § 2000e-2(k)(1)(B)(i) permits a much narrower departure from the requirement for isolating the responsible practice, where "the elements of a respondent's decisionmaking process are not capable of separation for analysis." The official legislative history makes clear that this analysis was intended to apply to "particular, functionally-integrated practices which are components of the same criterion, standard, method of administration, or test, such as [] height and weight requirements . . . ." Interpretive Memorandum, 137 CONG. REC. S. 15276 (daily ed. Oct. 25, 1991),

reprinted in 1991 U.S.C.C.A.N. 767; *see* Civil Rights Act of 1991, Pub. L. 102-166, § 105(b) (1991). This Court's standard, then, survived in large part the enactment of § 2000e-2(k)(1)(B)(i). *See Smith v. City of Jackson*, 544 U.S. 228, 241 (2005) (relying on *Wards Cove* to fault petitioners for failure to identify the specific practice being challenged as responsible for a disparate impact under the Age Discrimination in Employment Act). Thus, the Fifth Circuit's decision allowing plaintiffs to test the cumulative effect of a group of practices (including a seniority system), separable through evidence, on the basis that the employer has discretion to select which practice it will use in any particular decision making is not a proper application of the not-capable-of-separation-for-analysis review.

C. The Fifth Circuit's Decision Stands in Direct Conflict With *California Brewers*, Which Protects Seniority Systems Even When They Are Combined With Non-Seniority Criteria in Collective Bargaining Agreements.

These errors are not avoided by the fact that Lufkin's promotion process includes other criteria which Lufkin can use to make promotion decisions. A seniority system does not lose its status as such simply because an employer or, more specifically, the collective bargaining agreement, permits decision making based on seniority and non-seniority criteria. In *California Brewers Ass'n v. Bryant, supra*, this Court discussed the meaning of a "seniority system" under § 703(h). A "seniority system," the Court defined, is "a scheme that, alone or in tandem with

non-seniority criteria, allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase." *Cal. Brewers Ass'n v. Bryant*, 444 U.S. at 605-06; *see also Lorance v. AT&T Techs.*, 490 U.S. at 905 ("Seniority is a contractual right . . . and a competitive seniority *system* establishes a 'hierarchy [of such rights] . . . according to which . . . various employment benefits are distributed'") (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 768 (1976)).

The Court made clear that the combination of seniority with non-seniority criteria does not deprive seniority-based promotions of § 703(h) protection, though the non-seniority criteria would not necessarily share such protection:

> A collective-bargaining agreement could, for instance, provide that transfers and promotions are to be determined by a mix of seniority and other factors, such as aptitude tests and height requirements. That the "seniority" aspects of such a scheme of transfer and promotion might be covered by § 703(h) does not mean that the aptitude tests or the height requirements would also be covered.

Cal. Brewers Ass'n v. Bryant, 444 U.S. at 606 n.13. This Court also recognized that criteria having no relationship to seniority are not extended the protections of § 703(h) simply because of their "nexus" to seniority provisions:

> Significant freedom must be afforded employers and unions to create differing seniority systems.

> But that freedom must not be allowed to sweep within the ambit of § 703(h) employment rules that depart fundamentally from commonly accepted notions concerning the acceptable contours of a seniority system, simply because those rules are dubbed "seniority" provisions or have some nexus to an arrangement that concededly operates on the basis of seniority.

Id. at 608.

The reverse must be equally true – that seniority provisions do not lose their protection because of their use in combination with other factors. Thus, Lufkin's practice of promoting to some positions based on seniority pursuant to the collective bargaining agreement is a seniority system warranting protection under § 703(h). It does not lose its character as such simply because the company was authorized to use either seniority or some other non-seniority factors to make promotion decisions. Likewise, the seniority system did not lose its protection because, at the threshold, the company faced a subjective choice as to whether to rely on seniority or some other factor – the alleged practice challenged here. *California Brewers* does not permit such a result.

II. THE FIFTH CIRCUIT'S DECISION IMPOSING A LIABILITY PERIOD FOR A TITLE VII CLASS CLAIM BEGINNING ALMOST THREE YEARS BEFORE THE CHARGE THAT THE COURT OF APPEALS FOUND EXHAUSTED THE ADMINISTRATIVE REMEDIES FOR THE CLASS WAS FILED CONFLICTS WITH THIS COURT'S DECISIONS NEGATING LIABILITY FOR ACTS OUTSIDE THE TITLE VII LIMITATIONS PERIOD.

The Court should also review the Fifth Circuit's clear misapplication of Title VII and established Supreme Court precedent in allowing liability to be determined and back pay awarded on promotion decisions not challenged in a timely charge. The liability period, according to the district court, was governed by Plaintiff McClain's January 29, 1995 letter (which the district court accepted as a charge), as opposed to Buford Thomas's February 24, 1997 charge. The Fifth Circuit, however, determined that McClain's letter failed to exhaust the class's administrative remedies. The Fifth Circuit held that only Thomas's later-filed charge could support the class promotion claims. Nevertheless, the Court of Appeals used the time-barred promotions (occurring more than 300 days before Thomas's charge) to support the liability finding and directed the district court on remand to include in the back pay calculation promotions that were not subject to a timely charge. The Fifth Circuit summarily rejected Lufkin's request on rehearing to clarify that Thomas's charge establishes the liability period for promotion which begins on April 2, 1997, 300 days prior to the filing of Thomas's charge, and not on March 6, 1994, 300 days prior to McClain's letter. 42 U.S.C. § 2000e-5(e)(1).

A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977); *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2170 (2007). Failure to promote is a discrete discriminatory act not actionable if time barred, even if related to acts in timely filed charges. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113-14 (2002). In not applying the well-established precedent of the Court as to acts not made the basis for a timely charge, the Fifth Circuit places itself in direct conflict with this Court.

CONCLUSION

Congress has determined that promotion by seniority is not unlawful unless there is intent to discriminate. To permit seniority-based promotions to establish unlawful conduct by disparate impact, or contribute to it, violates § 703(h)'s plain language and its primacy over the not-capable-of-separation-for-analysis method of disparate impact proof articulated in § 2000e-2(k)(1)(B)(i), and is contrary to numerous decisions of this Court. The petition should be granted to consider the first question presented to avoid compromising the process of collective bargaining as the nation's unions and employers grapple with the far-reaching consequences of no longer being protected from a finding of unlawful conduct emanating from the possible disparate effect of seniority systems.

The petition should be granted to consider the second question to correct the Fifth Circuit's plain error in not recognizing and applying well-established

precedent of this Court establishing that a discriminatory act which is not made the basis of a timely charge is an unfortunate event in history which has no present legal consequences. *See United Air Lines v. Evans*, 431 U.S. at 558.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05-41417

[Filed February 29, 2008]
REVISED MARCH 10, 2008

SYLVESTER MCCLAIN, on his own behalf and on behalf of a class of similarly situated persons; BUFORD THOMAS, on this own behalf and on behalf of a class of similarly situated persons; PATRICK ROSS, on his own behalf and on behalf of a class of similarly situated persons; MARY THOMAS, on her own behalf and on behalf of a class of similarly situated persons; EDDIE K. MASK, on his own behalf and on behalf of a class of similarly situated persons; LEROY GARNER, on his own behalf and on behalf of a class of similarly situated persons; SHERRY CALLOWAY SWINT, on her own behalf and on behalf of a class of similarly situated persons; WALTER BUTLER, on his own behalf and on behalf of a class of similarly situated persons; also known as A; FLORINE THOMPSON, on her own behalf and on behalf of a class of similarly situated persons; CLARENCE OWENS, on his own behalf and on behalf of a class of similarly situated persons; also known as C;

CLIFFORD R. DUIRDEN, on his own behalf and on behalf of a class of similarly situated persons; EARL POTTS, on his own behalf and on behalf of a class of similarly situated persons; ROALD MARK, on his behalf and on behalf of a class of similarly situated persons

Plaintiffs - Appellants-Cross Appellees

v.

LUFKIN INDUSTRIES INC

Defendant - Appellee-Cross Appellant

Appeals from the United States District Court
for the Eastern District of Texas

Before JONES, Chief Judge, and HIGGINBOTHAM and CLEMENT, Circuit Judges.

EDITH H. JONES, Chief Judge:

In this complex Title VII class action against Lufkin Industries, Inc. ("Lufkin"), African-American plaintiffs allege that Lufkin's practice of delegating subjective decision-making authority to its managers with respect to initial assignments and promotions disparately affected them. After a bench trial, the district court issued a judgment in favor of the employees. After sifting through numerous issues, we reach results that are unfortunately inconclusive of the litigation. We affirm in part, reverse in part, and vacate and remand in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

Lufkin, a large manufacturing corporation located in Lufkin, Texas, is divided into four production divisions: Foundry, Trailer, Oil Field, and Power Transmission. The company employs approximately 1,500 hourly and salaried workers, and the hourly workers have been unionized for many years.

Only two of the representative plaintiffs in this class action filed EEOC complaints. Sylvester McClain ("McClain"), the named plaintiff, began working in Lufkin's Trailer division in 1972. In January 1995, he complained to the EEOC that his supervisor, Arden Jinkins ("Jinkins"), had discriminated against him based on his race. Among other things, McClain complained that Jinkins tried to have him demoted. Buford Thomas ("Thomas"), a Lufkin employee since 1979, filed his EEOC charge in February 1997, a year after he was allegedly constructively discharged. Thomas complained of being denied promotional and training opportunities because of his race while working in the Power Transmission and Oil Field divisions. The EEOC issued right-to-sue letters on both charges.

McClain and Thomas sued Lufkin for employment discrimination in violation of Title VII and 42 U.S.C. § 1981. The plaintiffs asserted that systematic racial discrimination pervades Lufkin's initial job assignments, training, promotions, and compensation. The district court certified the plaintiffs' disparate-impact claims as a class action involving 700

current and former Lufkin employees. The class was described as:

> All Black persons employed for any period of time by defendant Lufkin Industries on or after March 6, 1994, to date, whose compensation, remuneration, benefits, job assignments, promotional opportunities, career advancements and other terms and conditions of employment have been, may have been, or may become, adversely affected by defendant Lufkin Industries' past or present systems of administering hiring, wages, salaries, job assignments, training, evaluations, promotions, demotions, terminations, layoffs, recalls, and rehires.

McClain v. Lufkin Indus., Inc., 187 F.R.D. 267, 277-78 (E.D. Tex. 1999). The court, however, declined to certify a disparate treatment class. Two claims went to trial: (1) discrimination against blacks in Lufkin's assignment of newly hired employees; and (2) racially discriminatory promotion practices that rested on largely subjective decision-making criteria carried out by a largely white supervisory corps.

Protracted pretrial proceedings in this case included two class certification hearings, two interlocutory appeals to this court, and a two-year mediation effort. When the case finally went to bench trial, the court strictly limited each party to twenty hours for the presentation of its case. Ultimately, the district court found that Lufkin's practice of delegating subjective decision-making authority to its white managers with respect to initial assignments and

promotions resulted in a disparate impact on black employees in violation of Title VII. The court awarded the plaintiffs over $3.4 million in back pay, as well as attorneys' fees and injunctive relief. Both parties appeal.

II. DISCUSSION

Lufkin contends that the named plaintiffs failed to exhaust EEOC administrative remedies and lack standing to represent the class. Lufkin also contends that the district court erred in finding that Lufkin's promotion practices are subjective and incapable of separation for analysis and that they had a statistically significant disparate impact on black employees. Lufkin challenges the court's calculation of the back pay award according to a class-wide formula. Finally, Lufkin asserts that the cumulative effect of various errors, including the limited presentation of evidence, requires us to vacate the judgment.

For their part, the plaintiffs argue that the district court erred in refusing to certify a disparate treatment class, in failing to award appropriate injunctive relief, and in reducing their attorneys' fees. We turn first to Lufkin's contentions.

A. Lufkin's Arguments

1. Failure to Exhaust EEOC Remedies

As a threshold matter, Lufkin argues that the district court should have dismissed the plaintiffs' initial-assignment and promotion claims for failure to exhaust administrative remedies and for lack of

standing to represent a broadly defined class. Failure to exhaust is not a procedural "gotcha" issue. It is a mainstay of proper enforcement of Title VII remedies. Lufkin contends that McClain and Thomas complained to the EEOC about their individual disparate treatment by the company, but not about their hiring nor about any neutral employment practices on which a disparate-impact case depends. The scope of their administrative claims governs the scope of the class claims. *Vuyanich v. Republic Nat'l Bank*, 723 F.2d 1195, 1201 (5th Cir. 1984); *Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925, 929 (11th Cir. 1983). Consequently, Lufkin asserts, the EEOC was never presented with disparate-impact class claims concerning Lufkin's hiring and promotional practices, and the administrative process was circumvented.

The district court ruled that plaintiffs had exhausted their administrative remedies via McClain's January 1995 letter to the EEOC. *See* 29 C.F.R. § 1601.12(b); *Fellows v. Universal Rests., Inc.*, 701 F.2d 447, 451 (5th Cir. 1983). The court also held that a contemporary administrative proceeding pertaining to Lufkin by the Office of Federal Contract Compliance Programs ("OFCCP) sufficiently fulfilled the purposes of exhaustion. This court reviews *de novo* the district court's conclusion concerning exhaustion. *See Pacheco v. Mineta*, 448 F.3d 783, 788 (5th Cir.), *cert. denied*, 127 S. Ct. 299 (2006).

Title VII requires employees to exhaust their administrative remedies before seeking judicial relief. *Id.* Private sector employees must satisfy this requirement by filing an administrative charge with the EEOC. *Id.* at 788 n.6. The charge enables the

EEOC to investigate and, if appropriate, negotiate a resolution with an employer. Only after administrative efforts terminate may the employee sue the employer in federal court.

Courts should not condone lawsuits that exceed the scope of EEOC exhaustion, because doing so would thwart the administrative process and peremptorily substitute litigation for conciliation. Nevertheless, competing policies underlie judicial interpretation of the exhaustion requirement. *See id.* at 788-89. On one hand, the scope of an EEOC charge should be liberally construed for litigation purposes because Title VII "was designed to protect the many who are unlettered and unschooled in the nuances of literary draftsmanship." *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 465 (5th Cir. 1970). On the other hand, the "primary purpose of Title VII is to trigger the investigatory and conciliatory procedures of the EEOC, in [an] attempt to achieve non-judicial resolution of employment discrimination claims." *Pacheco*, 448 F.3d at 788-89. To reconcile these policies, this court construes an EEOC complaint broadly but in terms of the administrative EEOC investigation that "can reasonably be expected to grow out of the charge of discrimination." *Sanchez*, 431 F.2d at 466. We use a "fact-intensive analysis" of the administrative charge that looks beyond the four corners of the document to its substance. *Id.* In sum, a Title VII lawsuit may include allegations "like or related to allegation[s] contained in the [EEOC] charge and growing out of such allegations during the pendency of the case before the Commission." *Id.*

Among this court's numerous rulings on exhaustion of EEOC claims, we find most relevant the recent *Pacheco* opinion, which held that an employee failed to exhaust a disparate-impact claim because his EEOC charge alleged only disparate treatment and identified no neutral employment policy. 448 F.3d at 792. Although Pacheco's administrative charge complained that he had not been promoted because of racial discrimination, his subsequent lawsuit alleged both disparate treatment and disparate impact. *Id.* at 786-87. This court affirmed the dismissal of the disparate-impact allegations because:

> disparate-impact investigation could not reasonably have been expected to grow out of Pacheco's administrative charge because of the following matters taken together: (1) it facially alleged disparate treatment; (2) it identified no neutral employment policy; and (3) it complained of past incidents of disparate treatment only.

Id. at 792.

In this case, both the district court and the plaintiffs rely principally on McClain's January 1995 letter to establish administrative exhaustion. Like Pacheco, McClain specifically complained to the EEOC of disparate treatment and past incidents of discrimination against himself. His three-page letter to the EEOC describes "discriminatory treatment that I have been receiving for some time," and "discriminatory acts against me by Mr. Jinkins." McClain alleged that Jinkins, his supervisor, racially discriminated against him and tried to have him

demoted or fired on false charges of unsatisfactory performance.

McClain's letter nowhere refers to any neutral employment policy of Lufkin. Yet, according to *Pacheco*, "the cornerstone of any EEO[C] disparate-impact investigation" is a neutral employment policy. 448 F.3d at 792. Plaintiffs argue that a disparate-impact investigation could have grown out of McClain's letter because he alluded to a "cultural problem" that extended to all parts of Lufkin's business. A "cultural problem," however, is a vague term that cannot be understood as a neutral employment policy. *See, eg., id.* at 790. *Compare Marshall v. Fed. Express Corp.*, 130 F.3d 1095, 1098 (D.C. Cir. 1997) ("A vague or circumscribed EEOC charge will not satisfy the exhaustion requirement for claims it does not fairly embrace."), *with Gomes v. Avco Corp.*, 964 F.2d 1330, 1335 (2d Cir. 1992) (disparate-impact investigation "would reasonably have flowed from an EEOC complaint that referenced an eight-year track to promotion). McClain's letter not only failed to identify any neutral employment policy, but also said nothing about discriminatory hiring at Lufkin.

This limited interpretation of McClain's letter is confirmed by the actual scope of the EEOC's investigation, which is clearly pertinent to an exhaustion inquiry. *See Fine v. GAF Chem. Corp.*, 995 F.2d 576, 578 (5th Cir. 1993); *Fellows*, 701 F.2d at 451. Responding to the January 1995 letter, the EEOC sent McClain a proposed formal charge of discrimination in August 1996, in which the agency summarized his claim as follows:

> I have been subjected to different terms and conditions of employment by being denied comparable training, access to supplies and equipment needed to do a satisfactory job; given unsatisfactory evaluations.

The charge then repeats McClain's complaint of demotion. The plaintiffs also cite another of McClain's written statements to the EEOC, in which he suggests that other evidence could be disclosed to support his discrimination claim. In context, this sentence refers only to Lufkin's disparate treatment of McClain alone.

The district court attempted to fortify its conclusion that exhaustion occurred by taking into account an investigation by the OFCCP into "similar claims to those now before the court." The court seemed to think that an investigation by another federal agency can exhaust claims that must be handled by the EEOC and that Lufkin was effectively notified of its exposure to disparate-impact claims by responding to the OFCCP investigation. The district court cited no authority in support of its exhaustion bootstrapping, and we are aware of none. Further, no such Title VII shortcut to exhaustion or notification exists. Since 1970, the caselaw has explained that "the 'scope' of the judicial complaint is limited to the 'scope' of the *EEOC investigation* which can reasonably be expected to grow out of the charge of discrimination." *Sanchez*, 431 F.2d at 466 (emphasis added); *see also Pacheco*, 448 F.3d at 792 ("[T]he plaintiffs administrative charge will be read somewhat broadly, in a fact-specific inquiry into what *EEOC investigations* it can reasonably be expected to trigger." (emphasis added)); *Fellows*, 701 F.2d at 450-51. The district court erred by utilizing

OFCCP's investigation as a basis for inferring EEOC administrative exhaustion.

Although McClain's EEOC complaint and the OFCCP investigation failed to exhaust the employees' class claims, Buford Thomas's EEOC complaint carries part of the requisite burden. Thomas alleged to the EEOC that he was constructively discharged, denied promotional and training opportunities, and overloaded with work because of his race. He specifically stated that "[r]espondent has similarly discriminated against other black African Americans." Thomas's complaint, viewed in light of the recent *Pacheco* decision, presents a close question of exhaustion directed at a discriminatory, albeit neutral, company policy authorizing subjective promotion decisions. We conclude, however, that exhaustion was sufficient. Significantly, Lufkin did not contend otherwise in the trial court.[1]

Lufkin, instead, forcefully urged that the class failed to exhaust claims concerning Lufkin's alleged discriminatory assignment of newly hired black employees to the Foundry division. Hourly work in the Foundry division is hot and heavy to a far greater extent than in the company's other production divisions. But neither Thomas nor McClain, each with

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[1] Because exhaustion was satisfied, we need not here decide whether exhaustion is a jurisdictional or claim prerequisite. *See Pacheco*, 448 F.3d at 788 n.7. *See generally Arbaugh v. Y&H Corp.*, 546 US. 500 (2006) (employee numerosity requirement in 42 U.S.C. § 2000e(b) is an element of a Title VII claim and not a jurisdictional requirement).

twenty or more years at Lufkin, had worked in the Foundry division and neither man could or did complain to the EEOC about Foundry hiring practices. We are persuaded that the EEOC would not reasonably have investigated discriminatory assignment of new Foundry division employees based on either McClain's or Thomas's charge. *Eastland v. Tenn. Valley Auth.*, 714 F.2d 1066, 1067-68 (11th Cir. 1983) (class representatives could not assert initial assignment claims because all had been hired years before); *Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925, 929 (11th Cir. 1983) (EEOC investigation limited to promotion and harassment). Because of this deficiency, we must vacate the judgment awarding damages and injunctive relief against Lufkin based on discriminatory initial assignments to the Foundry division.[2]

Lufkin's liability will next be examined in regard to the class's promotion-discrimination claim.

2. Failure to Isolate a Specific Employment Practice

The district court identified Lufkin's subjective decision-making process in awarding promotions as the employment practice that caused a disparate

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[2] Caselaw also raises considerable doubt that McClain and Thomas would have had standing to assert the class hiring claims of Foundry division workers. *See E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 US. 395, 403 (1977); *Vuyanich*, 723 F.2d at 1200 (plaintiffs who alleged injury from hiring and termination practices could not represent class arising from other bank employment practices)

impact on black employees. To establish a prima facie case of discrimination under a disparate-impact theory, a plaintiff must show: (1) an identifiable, facially neutral personnel policy or practice; (2) a disparate effect on members of a protected class; and (3) a causal connection between the two. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988). Ordinarily, a plaintiff must demonstrate that each particular challenged employment practice causes a disparate impact. Yet, Title VII provides that "if the complaining party can demonstrate to the court that the elements of [the employer's] decision making process are not capable of separation for analysis, the decision making process may be analyzed as one employment practice." 42 U.S.C. § 2000e-2(k)(1)(B)(i).

Lufkin challenges two factual findings underlying the court's liability determination: that its decision-making process is subjective; and that its decision-making process could not be separated for analysis into components that were objective and non-racially biased. We address each in turn.

a. Subjective Decision Making

Lufkin argues that its promotion system is in fact overwhelmingly objective, and that the district court's finding of subjective decision making lacks support. We review this finding for clear error. *See Kona Tech. Corp. v. S. Pac. Transp. Co.*, 225 F.3d 595, 601 (5th Cir. 2000).[3]

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[3] In reviewing the court's findings, we consider evidence adduced during the bench trial but not the class certification hearings. The

In *Watson*, the Supreme Court defined subjective decision making as employment decisions "based on the exercise of personal judgment or the application of inherently subjective criteria." 487 US. at 988. The Court indicated that a system which incorporates a mixture of subjective and objective criteria should generally be treated as subjective. *Id.* at 989 ("However one might distinguish 'subjective' from 'objective' criteria, it is apparent that selection systems that combine both types would generally have to be considered subjective in nature.").

At Lufkin, promotions within the hourly ranks are putatively governed by a Collective Bargaining Agreement ("CBA) between Lufkin and three unions. Under the CBA, the company must post bid sheets for each new hourly opening. Seniority is the main criterion for promotion. However, plaintiffs offered evidence that promotions are not rigidly awarded according to seniority. Class members Sylvester McClain and Florine Thompson testified that they were personally bypassed for promotion in favor of a less senior white employee. Plaintiffs presented additional evidence that approximately half of all promotions were not awarded to the most senior bidder.

Moreover, the Collective Bargaining Agreement ("CBA) contains an ability clause that allowed Lufkin to fill positions on the basis of ability, regardless of seniority. The evidence indicates that ability

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class certification hearings provided Lufkin limited opportunity for examination on matters going to the merits.

determinations were not governed by objective standards. Paul Perez, Lufkin's Vice President of Human Resources, agreed that the ability determination was subjective. McClain testified that supervisors did not always truly evaluate ability when awarding promotions under the ability clause, but simply gave the position to the candidate they favored. Billy Webb, the union's chief spokesman, testified that the union had taken issue with the ability provision in past contract negotiations because it did not think that the ability clause was always administered fairly. The CBA also provides for a ten-day trial period following promotion. According to the testimony of one of its managers, Lufkin has no written guidelines or formal tests for determining which employees pass this trial period.

Plaintiffs also offered evidence that Lufkin permitted its managers to apportion training opportunities subjectively, a process that disadvantaged black employees who sought promotions. Perez testified that the CBA does not govern employees' daily work assignments, and he acknowledged that daily job assignments are not made on the basis of seniority. Perez testified that there are no written policies determining who is to receive on-the-job training, and Lufkin does not track how such training is allocated among employees. In addition, McClain testified that white employees were given more training in areas that were relevant to the jobs he sought. McClain explained that when "white managers and supervisors . . . see a man they want to put on a particular job, . . . they'll tap him" for training after his shift, or for external training. According to McClain, the employee who received the extra training

would be the most qualified and would therefore receive the promotion once the job became available.

The district court also heard testimony that Lufkin's allegedly objective measures for determining which employees were eligible to bid, such as attendance and discipline records, are subject to variance and manipulation. Lufkin has a computer program that tracks attendance, but both McClain and Thompson testified that the system was manipulable. If an employee was absent or tardy and the supervisor did not want the employee to lose credit, Thompson stated that the supervisor could non-schedule the employee or use the employee's vacation days to skew the records. With respect to discipline records, Steve Reynolds, a Lufkin supervisor, testified that there are no written criteria for determining when a rule violation should be "written up." He stated that this decision is left to individual supervisors.

The evidence also supported that Lufkin engaged in subjective decision making when awarding promotions in the salaried ranks. Salaried positions are not governed by the CBA, and company managers admitted that they were unaware of any guidelines, criteria, or documentation for the process of making promotions to salaried positions. Rather, most promotions in the salaried ranks are awarded through an interview process.[4]

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[4] The testimony of the plaintiffs' expert, Dr. Richard Martell, an Industrial Organization Psychologist, also supports the finding of subjective decision making. Dr. Martell testified that the personnel policies, procedures, and practices at Lufkin were

In light of this evidence, we are not left with the definite and firm conviction that the district court erred in finding subjective decision making in Lufkin's promotion system. *See United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). Although Lufkin offered some testimony during the bench trial that would tend to refute the court's finding, it was within the province of the district court to accord this testimony less credibility than that of the class members and their experts. "The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985). Accordingly, we cannot say the court's finding of subjective decision making in promotions amounted to clear error.

b. Not Capable of Separation for Analysis

Lufkin also challenges the district court's finding that its promotion practices are not capable of separation for review. Lufkin argues that if the court had isolated the objective factors in promotions – e.g. Lufkin's bidding practices and seniority – the court could not have found a discriminatory impact. As explained above, Title VII permits a plaintiff to demonstrate that the elements of the employer's decision-making process are not capable of separation for analysis and thus that the process should be analyzed as one employment practice. 42 U.S.C.

"decidedly subjective." After discussing Lufkin's promotion practices in some detail, Martell ultimately concluded that Lufkin is "awash in a sea of subjectivity that cuts across all manufacturing divisions."

§ 2000e-2(k)(1)(B)(i). This court has not addressed the precise conditions under which employment practices are "not capable of separation for analysis." But "where a promotion system uses tightly integrated and overlapping criteria, it may be difficult as a practical matter for plaintiffs to isolate the particular step responsible for the observed discrimination." *See Munoz v. Orr*, 200 F.3d 291, 304 (5th Cir. 2000). Some guidance is also provided by trial court decisions interpreting the provision. In *Stender v. Lucky Stores, Inc.*, the district court held:

> Where the system of promotion is pervaded by a lack of uniform criteria, criteria that are subjective as well as variable, discretionary placements and promotions, the failure to follow set procedures and the absence of written policies or justifications for promotional decisions, the court is not required to "pinpoint particular aspects of [the system]" that are unfavorable to [the protected group].

803 F. Supp. 259, 335 (N.D. Cal. 1992) (citation omitted); *see also Butler v. Home Depot, Inc.*, No. C-94-4335 SI, 1997 WL 605754, at *13 (N.D. Cal. Aug. 29, 1997) (unreported) (where employer delegated decisions to store managers who made subjective judgments about candidate's qualifications without written criteria, decision-making process not capable of separation for analysis); *Schallop v. N. Y. State Dept. of Law*, 20 F. Supp. 2d 384, 402 (N.D.N.Y. 1998) (entire process may be characterized as a single employment practice when employment decisions are made based on variable, subjective criteria); *Bannister v. Dal-Tile Int'l, Inc.*, No. 3:02-CV-2498, 2003 WL

21145739, at *2 (N.D. Tex. May 14, 2003) (plaintiff not required to pinpoint specific employment practices where the factors of a defendant's decision-making process are "so interwoven that they are incapable of separation").

There is no indication that the district court applied incorrect legal principles in determining that Lufkin's practices were incapable of separation. This finding of fact must be reviewed for clear error. *See Kona*, 225 F.3d at 601. Lufkin lists various ways in which its employment practices were analytically separable, but the court's express findings preclude separation according to those factors.

Lufkin argues, for example, that the plaintiffs' expert could have separated the challenged employment practices from its legitimate seniority system. The expert included in his analysis numerous promotions that contributed to the statistical shortfall in black promotions, even though these jobs were indisputably awarded to the most senior candidate. This argument ignores the district court's finding that Lufkin affords management considerable discretion in deciding whether to follow seniority in promotions. Plaintiffs could not statistically analyze the actual practice they challenge – subjective and discretionary application of the seniority provisions – by excluding promotion based on seniority. Seniority, the court found, was likely to have been irrelevant to the promotion.

Lufkin also contends that the plaintiffs should have separated out instances in which candidates were properly denied promotions because of unsatisfactory

attendance. This argument, too, runs afoul of the court's finding that managers have substantial discretion in applying attendance rules. In such a system, a denial of promotion for poor attendance is not helpful to Lufkin where promotions may also have been awarded following non-uniform interpretation of employee attendance rules.

Finally, Lufkin contends that its "paper bid sheets provided additional information that plaintiffs could have separated for analysis."[5] To the contrary, the district court rejected the bid data, which Lufkin prepared for purposes of this litigation, as unreliable and incomplete; ample evidence supports this finding.

Lufkin has not suggested any viable way, consistent with the court's findings, in which the plaintiffs could have separated the promotion criteria for review nor has it shown the district court clearly erred in so finding.

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[5] Specifically, Lufkin argues that the plaintiffs could have used the bid sheets to analyze separately whether blacks bid for jobs at some lesser rate than whites; whether blacks were ineligible for promotion more often than whites because promotion required movement to a higher rated job; whether blacks received fewer promotions because they did not pass a test or declined promotion; whether blacks were disqualified by the requisite minimum qualifications for master classifications or salaried positions more often than whites; and whether Lufkin's practice of promoting only candidates who sign the bid sheets adversely impacts blacks.

3. Statistically Significant Disparate Impact in Promotions

Lufkin maintains that the plaintiffs failed to demonstrate a statistically significant disparate impact against black employees in promotions. At trial, plaintiffs provided statistical evidence of discrimination through the report of their expert, Dr. Richard Drogin. After constructing hypothetical pools of employees who would be eligible for promotion, Dr. Drogin found that during the class period, black employees received 127 fewer hourly promotions and 8.85 fewer salaried promotions than should have been expected given their representation in these pools. Dr. Drogin determined that these differences were statistically significant at 7.61 standard deviations for hourly promotions and at 2.02 standard deviations for salaried promotions. In rebuttal, Lufkin offered the statistical analysis of Dr. Mary Baker. Dr. Baker conducted her calculations using bid data from Lufkin's paper bid sheets, and concluded that there was no statistically significant disparity in the promotion of blacks to hourly or salaried positions. Faced with this battle of experts, the district judge credited the testimony of Dr. Drogin over that of Dr. Baker.

Our role in reviewing this decision is limited. An appellate court owes great deference to the findings of the trial court with respect to duly admitted expert testimony. *Cleveland ex rel. Cleveland v. United States*, 457 F.3d 397, 407 (5th Cir. 2006). We review for abuse of discretion the district court's decision to credit one expert over another. *Id.* And we reverse a district court's factual finding that an employment decision

was the product of unlawful discrimination only if it is clearly erroneous. *See Bazemore v. Friday*, 478 US. 385, 398 (1986); *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985).

With these standards in mind, we turn to Lufkin's specific contentions. First, Lufkin argues that Dr. Drogin's analysis is legally insufficient because he did not use "actual" applicant lists and bid sheets to: (1) construct the availability pools; (2) consider potentially non-discriminatory explanations for the promotions; and (3) factor in qualifications of potential applicants. Lufkin is correct, of course, that actual applicant flow data are superior, and should be used if available. *See Anderson v. Douglas & Lomason Co.*, 26 F.3d 1277, 1286- 87 (5th Cir. 1994). But as discussed above, the district court expressly found that the bid data were incomplete and unreliable, noting that more than half of the promotions were missing from the bid database which Lufkin prepared in anticipation of this litigation. Where actual data are unreliable, courts often permit parties to analyze potential applicant flow data. *See, e.g., Malave v. Potter*, 320 F.3d 321, 326-27 (2d Cir. 2003); *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1414 (D.C. Cir. 1988); *Hameed v. Iron Workers Local 396*, 637 F.2d 506, 512 n.6 (8th Cir. 1980); *Lewis v. Bloomsburg Mills, Inc.*, 773 F.2d 561, 568 (4th Cir. 1985). The district court did not err in allowing plaintiffs to do so in this case.

Lufkin argues that even if the bid sheets were unavailable, Dr. Drogin's regression analysis would still be insufficient because his hypothetical applicant pools do not take into account other minimum

qualifications of applicants, such as education. However, in selecting an appropriate pool and performing regression analysis in Title VII cases, the Supreme Court has taught that a plaintiff's regression analysis need not include "all measurable variables." *See Bazemore*, 478 US. at 400 ("[I]t is clear that a regression analysis that includes less than 'all measurable variables' may serve to prove a plaintiff's case."); *see also Mozee v. Am. Commercial Marine Serv. Co.*, 940 F.2d 1036, 1045 (7th Cir. 1991). A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather his or her burden is to prove discrimination by a preponderance of the evidence. *Bazemore*, 478 US. at 400. We are satisfied that Dr. Drogin's regression analysis was sufficiently refined for plaintiffs to meet this burden.

Finally, Lufkin argues that a disparity in salaried promotions of only 2.02 standard deviations does not support the district court's finding of disparate impact. This court has rejected the contention that a disparity of two or three standard deviations is categorically insufficient to support an inference of adverse impact. *See Rendon v. AT&T Techs.*, 883 F.2d 388, 397-98 (5th Cir. 1989).[6] And Lufkin has not persuasively explained why a standard deviation of this magnitude should be accorded reduced significance under the particular circumstances of this case. We therefore affirm the district court's finding of a statistically significant disparate impact in promotions.

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[6] Other courts have reached the same conclusion. *See, eg., Palmer v. Schultz*, 815 F.2d 84, 96-97 (D.C. Cir. 1987); *Coleman v. Exxon Chem. Corp.*, 162 F. Supp. 2d 593, 616 (S.D. Tex. 2001).

4. Class-Wide Back-Pay Formula

Lufkin also challenges the class-wide back-pay award. The district court's calculation of a back pay award is reviewed for clear error. *Shipes v. Trinity Indus.*, 987 F.2d 311, 316-17 (5th Cir. 1993).

a. Class-Wide Formula or Individual Hearings

Lufkin complains that the district court erred by using a formula to calculate the award rather than computing damages on an individual basis. The complexity of the case is the determining factor in what method the district court should utilize to formulate a back-pay award. *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 261 (5th Cir. 1974). Whenever possible, back pay should be awarded individually and tailored to the actual victims of discrimination. *United States v. U.S. Steel Corp.*, 520 F.2d 1043, 1055-56 (5th Cir. 1975). If the class is small, the time period short, or the effect of the discrimination straightforward, individual determinations of each claimant's position but for the discrimination are possible. *Pettway,* 494 F.2d at 261. If, however, the class is large, the promotion or hiring practices are ambiguous, or the illegal practices continued over an extended period of time, a class-wide approach to the measure of back pay may be necessary. *Id.*; *see also Shipes,* 987 F.2d at 318.

In this case, the district court concluded that the size of the class and the inherent uncertainty of the individual claims contraindicates the use of an individualized approach. We agree. We are not persuaded that the district court could "easily" make individualized inquiries for each of the more than 700

plaintiffs in this case, as Lufkin contends. Further, as in *Pettway,* there is no practical way to determine through individual hearings which jobs the class members would have bid on and obtained but for the discriminatory procedures Lufkin had in place. *See Pettway,* 494 F.2d at 260. Class members outnumber promotion vacancies; jobs become available over time; the vacancies involve different pay rates; and a determination of who was entitled to a vacancy would have to be made by an evaluation of seniority and ability at that time. *Id.* (citing identical factors in approving the formula approach).[7] "[W]here employees start at entry level jobs in a department and progress into a myriad of other positions and departments on the basis of seniority and ability over an extended period of time, exact reconstruction of each individual claimant's work history, as if discrimination had not occurred, is not only imprecise but impractical." *Id.* at 262. An individualized process of determining actual damages for each plaintiff in this case would result in the "quagmire of hypothetical judgments" that courts should avoid. *Id.* at 260. Accordingly, the district court neither abused its discretion nor clearly erred in adopting the formula-driven approach.

b. Specific Methodology

While Lufkin levies various attacks on the district court's methodology for determining the back-pay

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[7] Lufkin argues that the court could readily make these determinations by reviewing the bid sheet database. This argument ignores the district court's finding that the bid sheet database was incomplete and unreliable.

award, these need not all be considered. With the elimination of a finding of class discrimination in initial assignments to the Foundry, the damage award must be vacated and remanded.

On remand, the district court will be dealing solely with damages attributable to approximately 127 lost promotions in hourly pay grades and nine lost salaried employment promotions. The accepted way to apportion damages among a class of plaintiffs who outnumber the lost promotion spots is to compute the total additional wages attributable each year to each promotion and divide the value among the class members. *See United States v. City of Miami,* 195 F.3d 1292, 1299-1302 (11th Cir. 1999); *Dougherty v. Barry,* 869 F.2d 605, 614-15 (D.C. Cir. 1989) (Ginsburg, J.); *Hameed v. Iron Workers* Local *396,* 637 F.2d 506, 520-21 (8th Cir. 1980). The district court should adapt this method with whatever modifications will both expediently and fairly apportion the lost wages among class members working in the multiple divisions of Lufkin.

What the court may not do is return to Dr. Drogin's lost wages calculations given our disposition of this case. Dr. Drogin estimated annual hourly wage disparities between black and white workers and black and non-white workers and made a similar racial comparison for salaried workers. The conclusions in this section of his report were intended to demonstrate the systemic effects of racially discriminatory Foundry assignments throughout workers' careers. Whether or not such conclusions would be supportable for both hiring and promotion claims, they do not pertain to the class claim that is now limited to lost promotions. Dr.

Drogin's figures would come close to compensating each class member for the full value of lost promotions, where plainly each member had at best a possibility of progressing up the ladder. The district court is free to consider any additional evidence that the parties may offer on this issue.

5. Limitation on the Presentation of Evidence and Trial Location

Lufkin argues that given the complexity of the issues involved in this case, the district court's imposition of rigid time limits on the presentation of evidence deprived Lufkin of a fair trial. A district court has broad discretion in managing its docket and structuring the conduct of a trial. *Sims v. ANR Freight Sys., Inc.*, 77 F.3d 846, 849 (5th Cir. 1996). It may maintain the pace of the trial by setting time limits on counsel. *Id.* Moreover, a judge has special latitude in applying time limits in a bench trial, since the court often has become familiar with the case long before trial begins and can readily comprehend the evidence presented. *Id.* at 850. Nevertheless, discretion has its limits. *See id.* at 849; *see also Kelly v. Boeing Petroleum Servs., Inc.*, 61 F.3d 350, 358 (5th Cir. 1995). "When the manner of the presentation of information . . . is judicially restricted to the extent that the information becomes incomprehensible then the essence of the trial [is] destroyed." *Sims*, 77 F.3d at 849.

In this case, we do not doubt that it was difficult for Lufkin to mount a defense against generalized claims of subjective decision making – claims that implicated all of its divisions and spanned almost a decade – in

the mere twenty hours the district court allowed each side. But even if the strict time limits amounted to an abuse of discretion, the district court's error is presumed harmless until shown to be prejudicial. *See Ruiz v. Estelle*, 679 F.2d 1115, 1129 (5th Cir. 1982); *see also Sims*, 77 F.3d at 849-50 (declining to reverse where the complaining party did not establish there was a reasonable probability that the outcome of the case would be different upon retrial). Lufkin has not persuaded us that it suffered reversible prejudice. Lufkin's related claim of "cumulative error" fails because it is essentially rendered moot by the pervasive effect of our appellate ruling.

B. Plaintiffs' Arguments

1. Disparate Treatment Class Certification

Plaintiffs contend that the district court erred in denying class certification of their 42 U.S.C. § 1981 disparate-treatment claim seeking declaratory, injunctive, and equitable back pay.[8] *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415-16 (5th Cir. 1998) (equitable monetary relief, i.e., back pay, available in (b)(2) class actions). The district court declined to certify the class under Rule 23(b)(2) because individual claims for monetary relief would have predominated, and it concluded that the class

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[8] Plaintiffs characterize the district court's decision as a "dismissal" of their disparate- treatment claim; however, the district court clarified that "a disparate treatment claim has not been 'dismissed' because a disparate treatment claim was never certified."

representatives would be "inadequate" if they dropped the class members' demand for compensatory and punitive damages in order to protect the "predominance" of nonmonetary claims. *See* FED. R. CIV. P. 23(b)(2). This court reviews the district court's class-certification decision for abuse of discretion. *See Allison*, 151 F.3d at 408. Whether the court applied the correct legal standard in reaching its decision is reviewed *de novo*. *Id.*

The district court did not abuse its discretion. *See Pegues v. Miss. State Employment Serv.*, 699 F.2d 760, 763 (5th Cir. 1983) ("Implicit in this deferential standard of review is the recognition of the essential factual nature of the certification inquiry and the district court's inherent power to manage and control pending litigation."). Motivated by *Zachery v. Texaco Exploration & Production, Inc.*, 185 F.R.D. 230 (W.D. Tex. 1999), the district court expressed concern about the plaintiffs' disavowal of monetary damages. In *Zachery*, the putative class representatives also dropped their demand for compensatory and punitive damages in order to achieve Rule 23(b)(2) certification. *Id.* at 233. As a result, class members would not have had the right to opt out of the class and might be barred from bringing individual damage claims. *Id.* at 243 (citing *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867 (1984)). Noting this serious conflict of interest, the court refused to impose upon the class members the decision by named plaintiffs to forfeit the compensatory and punitive damages claim. *Id.* at 244-45. We agree with *Zachery* and with the district court's conclusion here that if the price of a Rule 23(b)(2) disparate treatment class both limits individual opt outs and sacrifices class members'

rights to avail themselves of significant legal remedies, it is too high a price to impose. There was no error, much less abuse of discretion, in this certification denial.

2. Vague Remedial Injunction

Plaintiffs argue that the district court's remedial injunction lacks specificity, fails to remedy the discriminatory exercise of subjective decision-making practices, and includes no provision to ensure Lufkin's compliance. Lufkin agrees that the injunction is unenforceable for lack of specificity, but urges us to reject the additional injunctive relief that plaintiffs now request. We review a district court's fashioning of injunctive relief for abuse of discretion. *Peaches Entm't Corp. v. Entm't Repertoire Assocs., Inc.*, 62 F.3d 690, 693 (5th Cir. 1995).

The injunction at issue is identical to one the district court included in a preliminary order in January 2005. Lufkin appealed the injunction immediately after the preliminary order. We dismissed the appeal, stating that "[b]efore this matter is ripe for appellate review, the district court must identify the specific steps the defendant must take to implement and comply with the injunction." Despite this instruction, the district court included the original injunction verbatim in the final amended judgment.

The court's injunction lacks the detail required under Federal Rule of Civil Procedure 65(d). The injunction includes such vague directives as "cease and desist all racially biased assignment and promotion practices," "create and implement a program to ensure

that black employees receive an equitable proportion of promotions," and "take all necessary steps to remedy the effects of past discrimination." An order framed in these broad generalities fails to afford notice to Lufkin of its proscribed or required conduct and is therefore unenforceable. We vacate and remand for the court to try again.

This task will not be simple. Where, as here, Title VII does not require plaintiffs to pinpoint the specific practices that caused the discriminatory effect, it is especially difficult to craft an adequate remedial order that will eliminate discrimination without hobbling Lufkin's legitimate promotion policies. We leave to the district court the task of reviewing afresh the propriety of the injunction, and if it is found necessary, of balancing plaintiffs' requests for stronger measures to ensure Lufkin's compliance with the imprecision of the liability finding.

3. Attorneys' Fees

Plaintiffs contend that the district court abused its discretion by reducing their fees without conducting lodestar and *Johnson* analyses or making factual findings to support the reduction. A district court's determination of attorneys' fees is reviewed for abuse of discretion, and the findings of fact supporting the award are reviewed for clear error. *Von Clark v. Butler*, 916 F.2d 255, 258 (5th Cir. 1990).

The first step in determining statutorily authorized attorneys' fees is to calculate a "lodestar" amount by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate.

Rutherford v. Harris County, Tex., 197 F.3d 173, 192 (5th Cir. 1999). The court must then consider whether the lodestar should be adjusted upward or downward, depending on the circumstances of the case and the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). A district court must "explain with a reasonable degree of specificity the findings and reasons upon which the award is based, including an indication of how each of the *Johnson* factors was applied." *Von Clark,* 916 F.2d at 258.

In this case, the plaintiffs sought an interim award of attorneys' fees, costs and expenses approximating $6.5 million, covering 12,387.9 hours of work performed and nearly a million dollars in out-of-pocket costs. The district court slashed their request and summarily stated that Ms. Demchak's reported hours were "excessive and not necessary" and that the rates she requested were not "usual and customary" for employment discrimination cases in the geographical area. The court offered no reason to deny all compensation for time spent on the lengthy mediation effort; to deny compensation to Mr. Garrigan for his attendance at plaintiff Roald Mark's separate suit against Lufkin; to apply a blanket reduction of 25% to all of the billable hours reported by plaintiffs' counsel; and to reduce the hourly rates requested by plaintiffs' counsel. Because of these deficiencies, we must vacate the fee award and remand for the district court to conduct proper lodestar-fee and *Johnson* analyses, and award counsel a reasonable reimbursement.

III. CONCLUSION

The district court struggled to complete its work in this wide-ranging, complex discrimination case. Nevertheless, the sum of the foregoing discussion leaves much to be reconsidered. First, we vacate the judgment insofar as it holds Lufkin liable for a claim, unexhausted before the EEOC, that the company discriminatorily assigned newly hired African Americans to the Foundry division. Second, we affirm the judgment of Lufkin's liability to the class for the discriminatory impact of its subjective promotional policies. Because of this split decision, we must vacate and remand the damage award for further proceedings consistent with the foregoing discussion, as well as the award of injunctive relief and attorneys' fees.

AFFIRMED IN PART, REVERSED IN PART, VACATED AND REMANDED IN PART.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-41417
D.C. Docket No. 9:97-CV-63

[Filed February 29, 2008]

SYLVESTER MCCLAIN; ET AL)
)
Plaintiffs)
)
SYLVESTER MCCLAIN, on his own behalf)
and on behalf of a class of similarly situated)
persons; BUFORD THOMAS, on this own)
behalf and on behalf of a class of similarly)
situated persons; PATRICK ROSS, on his)
own behalf and on behalf of a class of similarly)
situated persons; MARY THOMAS, on her own)
behalf and on behalf of a class of similarly)
situated persons; EDDIE K MASK, on his own)
behalf and on behalf of a class of similarly)
situated persons; LEROY GAMER, on his own)
behalf and on behalf of a class of similarly)
situated persons; SHERRY CALLOWAY)
SWINT, on her own behalf and on behalf of a)
class of similarly situated persons; WALTER)
BUTLER, on his own behalf and on behalf of a)
class of similarly situated persons; also known)
as A; FLORINE THOMPSON, in her own)
behalf and on behalf of a class of similarly)
situated persons; CLARENCE OWENS, on his)
own behalf and on behalf of a class of)
similarly situated persons; also known as C;)
CLIFFORD R DUIRDEN, on his own behalf)

and on behalf of a class of similarly situated persons; EARL POTTS, on his own behalf and on behalf of a class of similarly situated persons; ROALD MARK, on his behalf and on behalf of a class of similarly situated persons

Plaintiffs - Appellants-Cross Appellees

v.

LUFKIN INDUSTRIES INC

Defendant - Appellee-Cross Appellant

Appeal from the United States District Court
for the Eastern District of Texas, Lufkin.

Before JONES, Chief Judge, and HIGGINBOTHAM and CLEMENT, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed in part, reversed in part, vacated and remanded in part to the District Court for further proceedings in accordance with the opinion of this Court.

ISSUED AS MANDATE: APR 14 2008

A True Copy
Attest

Clerk, U.S. Court of Appeals,
Fifth Circuit
By: /s/
Deputy APR 14, 2008

New Orleans, Louisiana

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS LUFKIN DIVISION

Case No. 9:97-CV-063

[Filed August 29, 2005]

SYLVESTER MCCLAIN, on his own behalf and on behalf of a class of similarly situated persons, et al. Plaintiff	)
V.	)
LUFKIN INDUSTRIES, Defendant	)

AMENDED FINAL JUDGMENT

I. Introduction

Plaintiff class members sued Lufkin Industries, alleging disparate impact employment discrimination in Lufkin's initial assignments to jobs, promotions, and compensation. After reviewing the anecdotal and statistical evidence presented by both sides, the court concludes that plaintiffs have proven their case and are entitled to back pay and injunctive relief. Having

received suggested findings of fact and conclusions of law from both parties, the court will not file a separate findings of fact. In lieu thereof, the following memorandum and order will serve as findings of fact and conclusions of law.

II. Factual Scenario

A. Background

Several ago, plaintiffs Sylvester McClain and Buford Thomas sued Lufkin Industries for employment discrimination. The plaintiffs' claims were certified as a class action in 1999. *McClain v. Lufkin Indus.*, 187 F.R.D 267 (E.D. Tex. 1999). The court also designated eleven additional class representatives. The case was closed from 2001-2003 while the parties attempted mediation, but that mediation failed. Between filing and trial, a number of claims were dropped with prejudice, including plaintiffs' general claim of disparate treatment. Only the claims of discrimination in initial assignments, promotions, and compensation went to trial.[1]

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[1] In its proposed pretrial order, Lufkin submitted a list of 96 witnesses that it intended to call before the court. Because the court was of the opinion that the testimony of so many witnesses would be duplicative, redundant, and largely irrelevant to the issues raised by a claim of disparate impact, it limited each party to 20 hours each in which to present its case. Lufkin protested the limitations when they were imposed and renewed its objection numerous times thereafter. After the close of trial, Lufkin submitted offers of proof on behalf of more than a dozen witnesses that it stated it would have called but for the court's time constraints. The court, having reviewed those offers of proof, finds

that they contained no probative information and would not have affected the court's ruling even if the witnesses had testified.

With one exception, the offers can be divided into two groups: those on behalf of Lufkin management and those on behalf of class members. Lufkin called most of its representatives at trial and elicited testimony on Lufkin's formal policies and procedures. The offers of proof did not contradict that testimony, nor did they supplement it in any meaningful form. The offers from Richard Gilley, David Jinkins, Larry Long, and Steve Reynolds all included the same information and followed the same format, reiterating the statements Lufkin made at trial. The different individual information offered, such as which jobs are supposed to be posted and which jobs are awarded on the basis of ability, is not new evidence to the issues before the court.

The offers on behalf of the class members would have been probative, had the plaintiffs retained their claim for disparate treatment. After reviewing those offers of proof, the court remains satisfied that many Lufkin managers and supervisors are not racists, that blacks have the opportunity to advance (at least to a certain level) at Lufkin Industries, and that many of the class members appreciate the jobs they hold at Lufkin. Similar statements were offered at the class certification hearing and at trial. The court was convinced of those facts before reading the offers of proof and none of the proposed testimony contained therein is particularly probative to a claim of disparate impact.

The one exception to those two categories is the offer of proof for Lisa Dungan, an employee of plaintiffs' counsel who supervised a review of the first database used by Lufkin's expert on statistics, Dr. Mary Baker. That database was riddled with flaws and inaccuracies and Lufkin produced a second, revised database on the eve of trial. The court accepts *arguendo* the proposition that Lufkin's new database is more accurate than the initial database it produced. Ms. Dungan, however, never saw the second database. As that would be the extent of her testimony, the court does not consider it particularly relevant that Lufkin "lacked the time" to recall Ms. Dungan to say so.

headquartered in Lufkin, Texas. It is headed by Chief Executive Officer Doug Smith. Smith is also Chairman of the eight-member Board of Directors. The company is divided into four production divisions: Foundry, Trailer, Oilfield, and Power Transmission. Each division is run by a vice-president and/or general manager with considerable policy-setting authority. The corporate sector manages the general affairs and internal workings of the company. In the more than 100 years that Lufkin Industries has been in business, no woman or person of color has ever been on the Board of Directors or headed a division.[2]

Each production division performs different tasks. The Foundry takes molten metal and shapes it into castings for commercial sale and use in Lufkin's other divisions. The Trailer division's products - freight vans, flatbeds, and floats - can be seen throughout the nation's highways. The Oilfield division makes oil pumping units and services and repairs those units. The Power Transmission division uses high-tolerance machines to produce heavy industrial gearing; some of its equipment can hold tolerances of a few microns.[3]

The working conditions in the various divisions differ greatly. The Foundry's work environment combines sweltering heat, deafening sound, and a thick layer of dirt and soot. The work is heavy and physically demanding. In contrast, workers in the

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[2] Paul Perez, a person of Hispanic origin, has been in charge of Lufkin's Human Resources and Legal departments

[3] A micron is 1/1000th of a milimeter

Power Transmission division use sophisticated machinery in a clean, air-conditioned environment. The workers in the Foundry are disproportionately black and Hispanic; the workers in Power Transmission are disproportionately white. The Oilfield and Trailer divisions constitute a middle ground of desirability between the Foundry and Power Transmission. Every division offers career opportunities and the potential for advancement, but there is a general hierarchy of pay that corresponds to working conditions.

B. Initial Assignments

Entry-level jobs in Lufkin's workforce are available solely through the Texas Workforce Commission ("TWC"). The TWC maintains a database of job applicants, which it consults when Lufkin submits a job requisition. After the TWC receives a job requisition, it creates a work order for the requested positions. The TWC checks its database and selects applicants who meet the stated minimum eligibility requirements for a job (such as a high school diploma or prior industrial experience). Some of Lufkin's entry-level positions, particularly in the Power Transmission and Oilfield divisions, now require a high school-level education.[4] Approximately 91% of blacks and 90% of whites hired by Lufkin meet that minimum qualification. In the Foundry, 90% of blacks and 85% of whites have a GED, high school diploma, and/or some post-high school education.

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[4] Lufkin defines this as a high school diploma or GED.

Once the TWC has assembled a group of qualified applicants, it refers them to the Lufkin personnel assigned to make the hiring decision. Once a TWC client is referred to Lufkin, the TWC steps out of the picture. The TWC has no input as to whether an individual applicant is hired for any given position.

Hiring decisions are made by a Lufkin representative - normally, Mr. Viron Barbay - or group of representatives, who travel to the TWC's offices to interview job applicants. Mr. Barbay interviews the applicants in the order in which they submit their application forms to the TWC reception. At the beginning of the class period, Barbay would make a first cut of the applicants, referring selected candidates to the Lufkin production managers for a second and decisive interview. But for some time now, Mr. Barbay has had sole authority to make the hiring decisions. At various times during the class period, Barbay was assisted or supplemented by other Lufkin HR employees, but Barbay testified that he was responsible for most of the hiring decisions during the class period. When Barbay did receive assistance, the other Lufkin HR personnel were invariably white. In theory, each applicant was always referred by the TWC for the specific job for which he or she applied

C. Promotions

1. Hourly Jobs

Advancement through the ranks of hourly workers at Lufkin Industries is putatively governed by the Collective Bargaining Agreement ("CBA") between Lufkin and the three unions that represent the hourly

workers. Seniority is the main criterion, but ability is also a necessary qualification. Once a worker moves past the entry-level unskilled jobs, that worker usually needs training to get the skills needed for more advanced positions. That training often comes on the job, as workers are assigned daily tasks that develop skills and abilities. Lufkin also makes additional training available outside the work day and provides tuition reimbursement for employees who choose to attend Angelina College.

All qualified employees[5] are eligible to bid on new job openings. The company must post bid sheets for each new hourly opening, then give interested workers several days to sign their name. After two to three days (depending on the division), the bid sheets are taken down and the job is to be awarded to the most senior bidder. According to the CBA, Lufkin need not award the job to the most senior bidder if the new job would constitute a lateral move or demotion. In theory, the posting process is a rigid and inflexible system that ensures the promotion of the most senior qualified person interested in the job.

Although seniority is the paramount qualification listed in the CBA, Lufkin has established several other rules that affect promotions. For some positions, Lufkin requires an "objective" test that generally involves a demonstration of basic math, literacy, and competence with the relevant machinery. Some of the

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[5] "Qualified" employees must have, at a minimum, satisfactory attendance/discipline record and at least 90 days working for Lufkin.

criteria are objectively verifiable, such as math skills or reading ability. Other criteria are left to the satisfaction of individual managers.

To ensure that competent workers occupy all positions, the company has also inserted an "ability" clause in the CBA that allows Lufkin to fill positions on the basis of ability and regardless of seniority. The ability clause appears to trump all other considerations.

The "bypass" rule is an exception to the seniority rule. It states that an employee will not receive a position on first shift (i.e., the most-desired daytime shift) unless that employee has spent at least two years on a nighttime shift or has twice been "bypassed" for promotion by less-senior employees with the nighttime shift qualification.

2. Salaried positions

Salaried jobs are sometimes posted, but they are not governed by the CBA and can be filled by anyone deemed suitable by Lufkin management. Lufkin has complete discretion to promote from within or hire from outside the company. Salaried positions do not necessarily pay more than hourly positions; in some cases, a worker at the top of the pay range for an hourly position would be taking a pay cut to accept a salaried position. However, salaried positions are often less physically demanding and offer the potential for advancement up the corporate ladder to the lucrative positions in management.

III. Legal Issues

A. Maintaining Class Standing

To maintain their class certification, plaintiffs had the burden to show that they met the four requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a). Because the case has gone forward under Rule 23(b)(2), the plaintiffs must also show that Lufkin has acted on grounds generally applicable to the class. For the same reasons discussed in the class certification motion, the court finds that each requirement has been satisfied. *McClain*, 187 F.R.D. at 277-82. The plaintiffs' decision not to pursue individual damages ensures that injunctive relief - rather than monetary relief - predominates. *See Allison v. Citgo*, 15 1 F.3d 402, 413 (5th Cir. 1998).

Lufiin has entered a motion challenging the adequacy of representation by each of the class members other than Sylvester McClain and Buford Thomas. The court is of the opinion that, given the length of the trial, the court's decision to proceed in Beaumont rather than Lufkin, and the demands of the representatives' respective jobs at Lufkin's facility in Angelina County, all named class members have maintained themselves as adequate representatives.

B. Exhaustion of administrative remedies

As this court has already decided, Sylvester McClain's January 29, 1995 letter to the EEOC was sufficient to exhaust administrative remedies on the class claims of discrimination in initial assignments,

promotions, and compensation. *See McClain*, 187 F.R.D. at 271; Orders entered 3/31/1999, Dkt #309 (denying Lufkin's motion for summary judgment on plaintiffs' initial assignment claim as being outside the scope of McClain's EEOC charge). As long as an EEOC investigation could reasonably be expected to grow out of the initial charge, the requirement for exhaustion of administrative remedies is satisfied. *Fine v. GAF Chem. Corp.*, 995 F.2d 576, 578 (5th Cir. 1993). An EEOC charge is to be construed liberally, particularly when it is prepared by a layperson. *See Clark v. Kraft Foods, Inc.*, 18 F.3d 1278 (5th Cir. 1994) ("[L]iberal construction [is] accorded EEOC charges, especially those by unlawyered complainants." *Id.* at 1280 n.7, quoting *Fellows* at 451; *Price v. Southwestern Bell Tel. Co.*, 687 F.2d 74, 78 (5th Cir. 1982) ("Consistent with the remedial purposes underlying Title VII, we construe employment discrimination charges with the 'utmost liberality,' bearing in mind that such charges are generally prepared by laymen untutored in the rules of pleading."), quoting *Terrell v. US. Pipe & Foundry Co.*, 644 F.2d 1112 (5th Cir. 1981); *see also Anjelino v. New York Times Co.*, 200 F.3d 73, 93-95 (3d Cir. 1999) (allowing sexual harassment claims to proceed even though the allegations were not specifically pled in the EEOC charges; plaintiffs' use of the term "abusive atmosphere" was sufficient to put defendant on notice). When the EEOC charge complains of systemic or widespread abuses, as McClain's 1995 charge did, it can reasonably be expected to produce a class-wide investigation. *See Richardson v. Byrd*, 709 F.2d 1016, 1020 n.4 (5 th Cir. 1983) (rejecting argument that the class claim was barred because of failure to complain of class-wide discrimination in the EEOC complaint, and holding, "a

class action may be based upon an EEOC complaint of individual discrimination as long as an 'EEOC investigation of class discrimination . . . could reasonably be expected to grow out of [the] allegations in [the] initial EEOC charge.'") *quoting Fellows v. Universal Restaurants*, 701 F.2d 447, 451-52 (5th Cir. 1983)). EEOC procedural regulations provide that a "charge is sufficient" when it "identif[ies] the parties and . . . describe[s] the action or practices complained of." *See Foster v. Ruhrpumpen*, 365 F.3d 1191, 1196 (10th Cir. 2004) ("Because the charges as filed 'identify the parties' and 'describe generally the action or practices complained of,' 29 C.F.R. § 1601.12(b), they satisfy the requirements set forth in the EEOC regulations.").

The administrative exhaustion requirement also exists to help the EEOC act effectively as an investigator and mediator. *Clayton v. Rumsfeld*, 2004 WL 1739465, *3 (5th Cir. 2004) (unpublished). If the EEOC is given no reason to investigate particular claims, it has no chance to resolve the underlying problems *Id.* In Lufkin's case, however, McClain's EEOC's charge was written while the OFCCP was investigating claims similar to those now before the court. The EEOC and OFCCP share overlapping enforcement responsibilities, *see* 64 Fed. Reg. 17664 (1999), and it seems only reasonable to take into account on-going federal investigations when considering what an agency might have known. Given the broad scope of McClain's claims and the obvious facial disparities in initial assignments, promotions, and compensation, it would be reasonable to expect an investigation into those issues to arise out of McClain's initial EEOC charge.

The court, having heard and considered all of the evidence presented at trial, reaffirms its previous finding that McClain successfully stated a charge that went beyond his own personal grievances and encompassed the claims now before the court. McClain therefore exhausted his administrative remedies before filing suit. There is no need for other class members to do so; they may "piggyback" onto McClain's efforts. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1 975).

C. Satisfying the Legal Requirements for a Claim of Title VII Disparate Impact

Plaintif§ have the burden to identify an employment practice that is facially fair but produces discriminatory results. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). "[T]he necessary premise of the disparate impact approach is that some employment practice, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977, 987 (1985). Plaintiffs establish a *prima facie* case of disparate impact by (1) identifying the specific employment practices being challenged, (2) establishing the disparate impact of the practices on the protected group, and (3) demonstrating that the disparity is the result of one or more of the employment practices identified. *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 656-57 (1989).

Plaintiffs are generally required to show that each challenged employment practice "causes" a disparate impact. 42 U.S.C. § 2000e-2(k)(1)(B)(I). However, if

plaintiffs can demonstrate that the elements of an employer's decision making process are not capable of separation for analysis, then the entire decision making process may be analyzed as a single employment practice. *Id.*; *see also McClain*, 187 F.R.D. at 273; *Munoz v. Orr*, 200 F.3d 291, 304 (5th Cir. 2000) ("where a promotion system uses tightly integrated and overlapping criteria, it may be difficult as a practical matter for plaintiffs to isolate the particular step responsible for observed discrimination."); *Malave v. Potter*, 320 F.3d 321, 327 (2d Cir. 2003) ("a decisionmaking process may be analyzed as a single employment practice if the complaining party can demonstrate to the court that the elements of [the employer's] decisionmaking process are not capable of separation for analysis.") (internal quotation marks and citation omitted); *Bannister v. Dal-Tile Int'l, Inc.*, No. Civ. A. 3:02-CV-2498, 2003 WL 21145739, at *2 (N.D. Tex. 2003) (plaintiff can bypass the requirement of pinpointing the specific employment practice or practices that caused the alleged disparate impact by showing that "the factors of [a defendant's] decision-making process are so interwoven that they are incapable of separation."); *Slender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 335 (N.D.Cal. 1992) ("[w]here the system of promotion is pervaded by a lack of uniform criteria, criteria that are subjective as well as variable, discretionary placements and promotions, the failure to follow set procedures and the absence of written policies or justifications for promotional decisions, the court is not required to 'pinpoint particular aspects of [the system]' that are unfavorable to women," and finding "that the elements of [the employer's] subjective and ambiguous decision making processes are not separable for the purposes of

analysis, and therefore may be analyzed as one employment practice."); *Butler v. Home Depot, Inc.*, 984 F. Supp. 1257, 1264 (N.D. Cal. 1997); *Schallop v. New York State Dept. of Law*, 20 F. Supp. 2d 384, 402 (N.D. N.Y. 1998) ("[Plaintiff] contends that because it would be impossible to isolate one particular aspect of the reappointment process, the entire process may be characterized as a single employment practice. When employment decisions are made based on variable, subjective criteria, this approach is appropriate under Title VII."); 137 Cong. Rec. S15276 (daily ed. Oct. 25, 1991) (explanation of § 2000e-2(k)(1)(B)(I) in the legislative history, that "When a decision-making process includes particular, functionally-integrated practices which are components of the same criterion, standard, method of administration, or test . . . the particular, functionally-integrated practices may be analyzed as one employment practice."), *quoted in Appleton v. Deloitte & Touche L.L.P.*, 168 F.R.D. 221, 226 (M.D. Tenn. 1996).

The causal element is satisfied with respect to discretionary and subjective employment decision making practices where an employer lacks objective criteria or guidelines for making those decisions, and leaves the decision making to the discretion of members of the majority group. *See Stender*, 803 F. Supp. at 320-21 (listing cases supporting that proposition). The mere presence of subjectivity does not raise an inference of discrimination. *Watson*, 487 U.S. at 990. But when discretionary, subjective decision making is supplemented by evidence that subconscious stereotypes and prejudice operate in a vacuum created by the absence of objective, validated

criteria, causation can be found. *See Id.*; *Stender*, 803 F. Supp. at 321; *Butler*, 984 F. Supp. at 1264

Once plaintiffs establish a *prima facie* case of disparate impact, the burden shifts to the employer to show that the challenged employment practice is job related for the position(s) in question and consistent with business necessity. 42 U.S.C. § 2000e-2(k)(1)(A)(I); *see Carpenter v. Stephen F. Austin State Univ.*, 706 F.2d 608, 621 (5th Cir. 1983); *EEOC v. Premier Operator Servs,* Inc., 113 F. Supp. 2d 1066, 1075 (N.D. Tex. 2000). Under *Griggs*, in order to prove business necessity, an employer must show that its selection criteria bears "a manifest relationship to the employment in question." *Griggs*, 401 U.S. at 432. In *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 650 (1989), the Supreme Court lowered this standard, requiring only the employer show that the challenged practice, "serves, in a significant way, the legitimate employment goals of the employer." *Id.* at 659. The 1991 Civil Rights Act overruled this aspect of *Wards Cove*, *see Stender*, 803 F. Supp. at 321 & n. 20, underscoring the principle that the business necessity standard is once again an exacting one. *See Watkins v. Scott Paper Co.*, 530 F.2d 1159, 1168 (5th Cir. 1976) (business necessity requires that the employment practices "must not only directly foster safety and efficiency . . . but also be essential to those goals.").

Even if an employer successfully mounts a business necessity defense, a plaintiff may overcome that defense by demonstrating the existence of an alternative employment practice which serves the employer's business necessity without causing the adverse impact, and which the employer had refused

to adopt, 42 U.S.C. § 2000(e)(k)(1)(B)(ii); *see also Premier Operating Servs.*, 113 F. Supp. 2d at 1075; *Stender*, 803 F. Supp. at 322.

D. Supporting a claim of disparate impact with statistical evidence

Anecdotal evidence of discrimination against individuals brings the cold statistics to life and may buttress the showing of class wide discriminatory practice. *See Int'l Bhd. of Teamsters*, 431 U.S. 324, 339 (1977). However, plaintiffs need not prove any individual case of discrimination to prevail on a pattern or practice disparate impact claim. *Id.* at 342, n. 24; *Bernard v. Gulf Oil Corp.*, 841 F.2d 547, 568 (5th Cir. 1988). The essence of a pattern or practice claim lies in the absence of evidence; while no individual has a clear-cut claim, the group as a whole has presented evidence establishing the unquestioned presence of discrimination.

Statistical proof alone can make out a *prima facie* case of disparate impact. *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 650 (1989); *Teamsters*, 431 U.S. at 339. To establish causation, statistics must be "of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Watson*, 487 U.S. at 994. However, "[a] plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence." *Bazemore v. Friday*, 478 U.S. 385, 400 (1986). "[A]s long as the court may fairly conclude, in light of all the evidence, that it is

more likely than not that impermissible discrimination exists, the plaintiff is entitled to prevail." *Id.* at 400-401; *Siler-Khodr v. Univ. of Texas Health Science Ctr. Sun Antonio*, 261 F.3d 542, 547 (5th Cir. 2001), *quoting Bazemore*.

As this court has previously held in this case, "There are no bright-line rules regarding what degree of statistical disparity is necessary to support a disparate impact claim. Traditionally, the statistics must show a 'gross disparity' in how the different races are affected. ... A deviation greater than three standard deviations is sufficient to support a prima facie case."). Class Certification Order, 187 F.R.D, at 276 (citations omitted). *See Thomas v. Deloitte Consulting LP*, No. 3-02-CV-0343-M, 2004 WL 1960097, at *5 (N.D. Tex. 2004) ("The Fifth Circuit has never adopted a 'bright line' test for statistical significance. Indeed, most courts have rejected the arbitrary application of a 5% threshold.") (internal citation omitted); *Rendon v. AT & T Technologies*, 883 F.2d 388, 397-98 (5th Cir. 1989) (rejecting argument that there is a strict legal benchmark requiring a particular number of standard deviations to demonstrate that data has statistical significance). Moreover, "[w]hether a given [test result] should be regarded as statistically significant must be determined on a case by case basis since the value signifying statistical significance is dependent upon sample size." *Overton v. City of Austin*, 871 F.2d 529, 544 (5th Cir. 1989) (Jones, J., concurring).

A disparity of 1.96 or more standard deviations is a generally accepted metric for statisticians looking to establish statistical significance. *Palmer v. Shultz*, 815

F.2d 84, 96 n.9 (D.C. Cir. 1987) (adopting a threshold of 1.96 standard deviations as sufficient to raise an inference of discrimination based on the Supreme Court's language in *Castenada* and *Hazelwood*); *Albemarle Paper Co.*, 422 U.S. at 431. Even statistical disparities falling just short of the traditional standard of 2 (or 1.96) standard deviations may sometimes be meaningful, since consistent shortfalls in every category are probative of a pattern of discrimination, especially when other evidence confirms allegations of discrimination. *See e.g.*, *E.E.O.C. v. Am. Nat'l Bank*, 652 F.2d 1176, 1192 (4th Cir. 1981), *cert. denied*, 459 US. 923 (1982) (rejecting employer's argument that the plaintiff's statistics were not probative unless they exceeded two or three standard deviations, holding that "well short of three standard deviations, the probability levels for chance as explanation have already dropped far below the point at which courts of law concerned with proof by the 'greater weight' or 'preponderance' of the evidence would presumably have discarded the hypothesis of chance."); *Malave v. Potter*, 320 F.3d 321, 327 (2d Cir. 2003) (courts generally consider a statistically significant disparity of two standard deviations to be sufficient to warrant an inference of discrimination in a prima facie case of disparate impact.) *See also Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359, 362, 363 (7th Cir. 2001); *Thomas*, 2004 WL 1960097, at *5; *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 821 (5th Cir. 1982).

Despite the necessary primacy of statistical evidence, proof of intent remains relevant to a claim of disparate impact employment discrimination. "The distinguishing features of the factual issues that typically dominate in disparate impact cases do not

imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used. . . . Rather, the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Watson*, 487 US. at 987 (citation omitted). Evidence of discriminatory intent can buttress and bolster statistical data, while also serving to rebut a defense of business necessity.

E. Establishing Damages

Plaintiffs who prove their claims of discrimination remain entitled to injunctive relief. That relief includes back pay and is limited to those who can demonstrate that they were at least "potential victims." *Teamsters*, 431 US at 367. Back pay is not automatically awarded simply because a plaintiff has proven racial discrimination. *U.S. v. Ga. Power Co.*, 474 F.2d 906, 922 (5th Cir. 1973). It is to be awarded only when "properly owing to the plaintiffs." *Id.* However, when it is properly owing, the court should not confuse the impossibility of precise ascertainment with the impossibility of relief. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974). When plaintiffs have demonstrated that they are owed back pay, relief must also be crafted to avoid a "quagmire of hypothetical judgments." *Id.* Any uncertainty is to be settled in favor of the prevailing plaintiffs and against the discriminating employer. *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1380 n. 53 (5th Cir. 1974).

The preferred *Teamsters* method requires each class member to establish damages individually, but a departure from that approach is justified when subjective employment practices, including lack of objective hiring criteria and word-of-mouth recruitment, "make[] it difficult to determine precisely which of the claimants would have been given a better job absent discrimination, but it is clear that many should have." *Domingo II*, 727 F.2d at 1444; *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 167, 176 (N.D.Cal 2004). As the *Domingo* court further explained: 'When the class size or the ambiguity of promotion or hiring practices or the illegal practices continued over an extended period of time calls forth [a] quagmire of hypothetical judgment ... a class-wide approach to the measure of back pay is necessitated.'" *Id. quoting Pettway*, 494 F.2d at 261; *See also EEOC v. O & G Spring & Wire Forms Spec. Co.*, 38 F.3d 872, 879-880 & n. 9 (7th Cir. 1994) (approving district court's use of formula approach); *Hameed v. Int'l Ass'n of Bridge Workers, Local 396*, 637 F.2d 506, 520, 521 & n. 18 (8th Cir. 1980) (same) (and cases cited therein); *Stewart v. Gen'l Motors Co.*, 542 F.2d 445, 452-53 (7th Cir. 1976) (same) (and cases cited therein); *EEOC v. Chicago Miniature Lamp Works*, 668 F. Supp. 1150, 1151-52 (N.D. Ill.1987); *Green v. United States Steel Corp.*, 640 F. Supp. 1521, 1525-26 (E.D. Pa.1986), *aff'd in part and vacated in part on other grounds*, 843 F.2d 1511 (3rd Cir. 1988), *vacated in part on other grounds*, 490 U.S. 1103, 109 S. Ct. 3151, 104 L. Ed.2d 1015 (1989).

The Fifth Circuit has approved the use of racially drawn, class-wide formulas, but only as a last resort. *U.S. Steel*, 520 F.2d at 1055-56. Using a formula

generates a windfall for some employees who were never actually harmed by discrimination. *Stewart,* 542 F.2d at 452-453; *Pettway,* 474 F.2d at 262; *O & G Spring & Wire Forms,* 38 F.3d at 879. *Hameed,* 637 F.2d at 519-20. As a corollary, a formula undercompensates the genuine victims of discrimination by forcing them to share their award with their undeserving brethren. *Id.* Unfortunately, that result is inevitable when an employer's specific employment decisions do not allow a precise reconstruction of the effects of discrimination. *Pettway,* 474 F.2d at 262; *see also Johnson,* 491 F.2d at 1380.

Formulas are to be used only after the court has considered and rejected all alternative methods of superior certainty. *Id.* At a minimum, the court should attempt to distinguish subgroups of the class who were injured to a greater or lesser extent. *See Id.* at 1056 (rejecting approach that would have used an "indiscriminate black-white averaging approach . . . absent at least a precise breakdown of subgroups from the standpoint of plant age); *Pettway,* 474 F.2d at 262. Even when the court can not isolate the effects of discrimination on any given individual, the court may still be able to identify subgroups who were especially hard-hit by the discriminatory policy. Conversely, there may also be subgroups who suffered relatively little harm. Identifying those subgroups is one way to ensure that back pay is awarded to those who are most deserving.

A prevailing plaintiff is also entitled to pre-judgment interest in most cases. Pre-judgment interest "should" be included in back pay, absent good reasons not to award it. *Gloria v. Valley Grain Prod.,*

Inc. 72 F.3d 497, 499 (5th Cir. 1996). The Fifth Circuit has consistently approved awards of pre-judgment interest in Title VII cases so as to make whole the injured party. *Sellers v. Delgado Cmty. Coll.*, 839 F.2d 1132, 1140 (5th Cir. 1988); *Thomas v. Tex. Dep't of Criminal Justice* (5th Cir. 2002). The federal rate of interest set by 28 U.S.C. § 1961 is appropriate, but is not the only acceptable rate. *Williams v. Trader Pub. Co.*, 218 F.3d 481, 488 (5th Cir. 2000). The decision as to where to set the rate of interest is generally left to the sound discretion of the trial court. *Valdez v. Church's Fried Chicken*, 683 F. SUPP. 596, 636 (W.D. Tex. 1988); *Odom v. Frank*, 782 F. SUPP. 50, 52 (N.D. Tex. 1991).

IV. Factual Application

A. Initial Assignments

Lufkin's subjective practices and policies disparately impacted its black employees. If Lufkin's claims were to be believed, there is no way for racism to influence any aspect of its initial assignment process or promotions. According to Lufkin's description of its practices and procedures, the TWC controls the flow of applicants to each division; there is thus no way for an applicant to find work in a position other than one he himself selected. Lufkin also claims that its promotions process is entirely governed by the CBA and objective tests of ability and skill, with no significant subjective component. Lufkin's official policies describe lay out a color-blind process with no room for individual bias. Unfortunately, the evidence and testimony given before the court do not support Lufkin's claims.

The testimony of Tami Poulan satisfies the court that Lufkin's account of its process for initial assignments is not entirely accurate. Ms. Poulan is an employee of the TWC and an uninterested witness not affiliated with either party; the court thus gives substantial weight to her testimony and the business records produced by the TWC. Those records show that the TWC sometimes receives job requisitions from Lufkin that may lack a specific job title or department location. In those circumstances, there is no way that the TWC could refer applicants for a specific job.

Even when Lufkin's requisition does specify a specific job position, there are instances of applicants who are willing to accept "any work" or "industrial work." The records list almost 400 workers who were hired for positions other than the ones for which they were referred. When Lufkin is looking to fill multiple positions at the same time, nothing prevents it from picking and choosing among the applicants for all positions. Applicants who are interested in clerical jobs or positions in the Power Transmission or Oilfield divisions may nevertheless be willing to accept a position in the Foundry or Trailer divisions if that is all they are offered. When Lufkin's hiring personnel are allowed to exercise their discretion, discriminatory intent becomes relevant.

Evidence of discriminatory intent was offered by class member Vivian Crain. Ms. Crain testified that Viron Barbay, the man largely responsible for initial assignments during the class period, allegedly used racial slurs, told racist jokes, and spoke poorly of minority applicants. Mr. Barbay's conduct during the

actual interviews has also been called into conduct by other class members.

The testimony of class member Kelvin Pope is also probative. Mr. Pope testified at trial that he was discouraged from applying as a welder. According to Pope, he was told by Viron Barbay that if he applied as a welder and was unable to pass a stick, bend, x-ray, and stress test, then he would be unable to reapply as a welder for 60 days. Pope said that Barbay told him to apply as a basic helper in the trailer division, crossing out his application for a position as machinist helper or forklift operator. When Pope subsequently took the actual welding test, it was much easier than the test described by Barbay and required none of the techniques that Barbay had mentioned.

The testimony offered by class members at trial does not alone establish discrimination on Lufkin's part; it merely demonstrates the considerable discretion possessed by Viron Barbay and raises questions about his use of that discretion. However, that testimony must also be considered in light of the TWC's records showing an abundance of workers assigned to positions other than the ones for which they were referred. Thus, despite Lufkin's contentions that the TWC's rules and its own procedures make channeling impossible, black applicants can be channeled into less-desirable positions. The statistical evidence discussed below offers more reason to believe that they have been.

B. Promotions

1. Hourly positions

The evidence before the court also shows that white employees have a significant advantage in gaining the skills and abilities needed to qualify them for promotion.[6] Because workers' day-to-day assignments are not governed by the CBA, supervisors have broad latitude to schedule workers as they see fit. No one checks or oversees that process and there is no right in the CBA to a specific position within a job classification. White employees can be, and are, selected and groomed for further advancement and managerial roles. Black employees are more likely to be placed in dead-end positions and left to seek training on their own, outside of regular work hours.

Class member Leroy Garner testified at the class certification hearing that the ability clause overrode seniority for many of the better jobs. Promoted African-Americans are held to a higher standard and given just two weeks to demonstrate proficiency at a new job. In contrast, whites are given more leeway and time to learn the intricacies of their new jobs while at work.

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[6] Although the specific claim for class-wide discrimination in training is no longer before the court, the availability of training remains relevant in assessing Lufkin's claim that its promotions are color-blind and not influenced by discriminatory policies and decision-making.

Class member Calvin Deason testified at trial that he was bypassed for a storekeeper position even though he was the most senior bidder. Deason said that he was told by Lufkin management that "we don't want to let experienced people out of the cleaning room." The job was instead given to a white probationary employee with two weeks' tenure. Lufkin claims that Deason was denied the job because it would be a demotion and he was thus not an eligible bidder, but Lufkin eventually gave the job to a probationary employee. Under the CBA, probationary employees are not eligible bidders. Lufkin notes that the CBA does not govern postings when there are no eligible bidders, but the incident demonstrates the reality of Lufkin's subjective decision-making; when confronted with a unfettered choice between a black employee and a white employee interested in the same job, it gave the job to the white employee. Even when blacks do get additional training or education (by their own initiative or otherwise), they are discouraged from applying for better positions. Plaintiffs allege that some, though by no means all, of Lufkin's managers and supervisors actively discouraged black employees who had bid on better jobs. The effects of that discouragement are a potential variable unreflected in the statistics of Lufkin's expert, Dr. Baker.

Lufkin has many "objective" requirements that it cites as binding rules, but the evidence before the court demonstrates that Lufkin's managers have considerable discretion in applying or ignoring those rules. Attendance bookkeeping, availability of leave time, extra job training, and preferential day-to-day job assignments are all subject to flexibility and manipulation. Those rules have direct and/or indirect

effects on an employee's prospects for promotion. The unions, which are supposed to act as watchdogs, are called in only when a worker is directly disadvantaged. When a white worker receives an unfair advantage that hurts no one else specifically, such as an absence that is not marked or a chance to train on a new machine, the unions have no leverage.

Lufkin's requirement that personnel for some jobs be "qualified" allows subjectivity and personal bias to influence the promotion process directly. As Kelvin Pope testified, class members can be told that they are unlikely to pass a required test, or flunked if the components of test are sufficiently subjective. Because managers and supervisors at Lufkin give whites preferential treatment, blacks are less likely to gain the necessary skills. Even positions awarded to the senior bidder regardless of qualification can be influenced when supervisors are discouraging blacks from applying black advancement. It is thus not surprising that blacks are hesitant to bid and may choose to withdraw their bids even if selected.

2. Salaried positions

The evidence shows that class members in salaried positions also face difficulties; class members Florine Thompson and Sylvester McClain testified that they were demoted despite taking advantage of Lufkin's education/tuition reimbursement program to further their education. Both had expressed discontent with aspects of Lufkin's race-related policies; both were demoted from salaried positions to hourly positions. Ms. Thompson has earned two associate degrees, but was demoted from her salaried position and now works

as a security guard. She testified that her demotion occurred shortly after she raised concerns about a hostile working environment with Lufkin management. It took Mr. McClain years to get promoted to a salaried position and, according to his testimony, required the direct intervention of a former Lufkin CEO, Frank Stevenson. Shortly after Mr. Stevenson left, McClain was demoted to an hourly position and told "You will never be able to move up in management again. This is the only job we have for you. So don't even try."

C. Statistical Evidence

Though anecdotal evidence is useful to provide a context, a lawsuit based on a theory of disparate impact generally requires statistical evidence to document and substantiate claims of discrimination. Both sides presented voluminous data supporting their points. The plaintiffs' statistical case was presented by Dr. Richard Drogin, while Lufkin's rebuttal was offered by Dr. Mary Baker. Dr. Drogin found evidence of significant statistical disparities in both the initial assignment of blacks to the Foundry as well as promotion of blacks throughout Lufkin Industries.

1. Statistical Evidence on Initial Assignments

During the class period, blacks were disproportionately assigned to the Foundry. Of all African-Americans hired for entry-level jobs at Lufkin, 51.8% were assigned to the Foundry. In contrast, only 24.3% of similarly situated whites were assigned to the Foundry. As a necessary corollary, black employees

were far less likely to be assigned to positions in the other divisions.

As a result of this pattern of initial assignments, African-Americans make up more than a quarter of the Foundry's workers and a slightly smaller proportion of the employees in the Trailer and Oilfield division, but in the Power Transmission division and Corporate sector, black employees make up just 7% to 10% of the workforce. In contrast, white employees constitute more than 70% of the Trailer and Oil Field divisions and almost 90% of the Power Transmission division and Corporate sector. In the Foundry, where the hottest, dirtiest, noisiest, and most physically demanding jobs are to be found, whites make up little more than a third of the workforce.[7]

If the rate of initial assignment of black workers to the Foundry had mirrored the representation of black employees throughout the company, Dr. Drogin testified that he would have expected 65 fewer black employees being assigned to the foundry. The actual outcome was statistically significant at almost nine standard deviations; in other words, the possibility that the pattern of initial assignments occurred solely by random chance was less than one in one hundred billion. That figure is well beyond the widely accepted standard of three standard deviations. *See McClain,* 187 F.R.D. at 276. Dr. Drogin also testified that 44 black workers would be expected in the other divisions. Their absence is statistically significant at more than

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[7] Hispanic workers make up the remainder of the Foundry's employees.

five standard deviations. The explanation that random chance allowed resulted in that pattern is less than one in one million.

Not surprisingly, Lufkin has attacked Dr. Drogin's methodology and results. Lufkin claims that Dr. Drogin's assumptions were flawed, that his statistical models were poorly constructed, and that his results are therefore useless in describing the actual situation at Lufkin Industries. Lufkin claims that it hires only those individuals referred to it by the TWC, and that those individuals are referred for specific positions only. As such, Lufkin claims that there is no way for it to channel black employees into the Foundry or away from other divisions. Lufkin also criticized Dr. Drogin's decision not to control for the possibility that Lufkin's high school degree requirement had a disparate impact on blacks. However, Lufkin's own data indicate that its black employees are *more* likely to possess a high school diploma or GED equivalent and *more* likely to possess additional schooling beyond the high school level. Over 90% of the African-Americans hired by Lufkin have a high school education, meaning that almost all of Lufkin's black employees meet the minimum criteria for Lufkin's entry-level jobs. Lufkin has offered no evidence that individual qualifications explain any of the disparities.

As part of Lufkin's defense, Dr. Baker testified that her statistical analysis showed that Lufkin's initial assignments to the Foundry correlate closely with the pools of actual applicants available to Lufkin, and that Lufkin's decisions are statistically race-neutral given the actual people who applied. Dr. Baker claimed that Dr. Drogin's statistical models did not match the

actual processes used by Lufkin, that her models were based on the actual processes used, and that her analyses were thus more relevant to the issues before the court. For the reasons discussed above, the court has already found that Lufkin's initial assignment processes may or may not have matched their claims. Dr. Drogin's statistical models are reasonably valid, given the uncertainty about the actual processes and the actual makeup of the applicant pools.

Dr. Baker's statistical claims are also undercut by her curious decision not to analyze the assignment of workers to any division other than the Foundry. Her decision not to do so, in light of the plaintiffs' Second (and final) Amended Complaint makes little sense. In their Complaint, plaintiffs alleged that "Defendant, Lufkin Industries, has assigned disproportionately more black African American class members to difficult and unpleasant jobs and disproportionately fewer black African American class members to less strenuous and more desirable positions." Plas. Second Amended Compl. ¶ 113. The court's March 31, 1999 Order certifying the case as a class action also included the underassignment claim. *McClain,* 187 F.R.D. at 273 ("Plaintiffs assert (and their statistics support) that African-Americans are over represented in difficult and unpleasant jobs, and under represented in less strenuous positions. This channeling process is not guided by any objective standards or procedures of reviewing them."). At trial, Dr. Baker's testimony and attempted defense of her methodology was singularly unconvincing and offered little additional credence to her rationale. Even if the court chose to accept Dr. Baker's contention that the actual applicant pools do not show any overassignment of black new hires to the

Foundry, the court would of necessity accept the corollary presented by Dr. Drogin: that Lufkin underassigns black workers to all other divisions.

Since Lufkin claims that there are no objective criteria that would disproportionately disadvantage African-Americans, the logical conclusion to be drawn from the testimony and evidence presented to the court is that Lufkin's subjective procedures are responsible for the concentration of black employees in the Foundry. After considering the expert testimony of both sides, the court sees no alternative to the conclusion that Lufkin is discriminating in its initial hiring.

2. Promotion Statistics

a. Hourly Promotion Statistics

Plaintiffs have also provided statistical evidence of discrimination in promotions. Overall, Dr. Drogin found that from March 6, 1994 through 2002, there were 2,326 promotions within the hourly wage (EEO-6 to -8) levels; 1,325 of which went to whites and 476 to African Americans. African Americans received 127 fewer promotions than expected from their representation in the availability pools in each year during 1994-2002. This disparity has a Z- value of –7.61, indicating a statistically significant under-promotion of African Americans with a one in one hundred million chance of occurrence by random fluctuation.

The pattern of African American shortfalls in promotions is consistent across years. The disparities

found by Dr. Drogin are statistically significant in 5 out of the 8 years for which complete year data is shown. The total shortfall of African American promotions would occur by chance less than one time in ten trillion events.

Dr. Drogin also analyzed rates of promotions of African Americans in each of the EEO categories 6, 7 and 8 separately, noting that these three categories include the jobs held by 90% of Lufkin's African American employees. African Americans received 77.84 fewer promotions then expected out of EEO-8 positions, 24.51 fewer promotions than expected from EEO-7 jobs, and 24.80 fewer promotions than expected from EEO-6 jobs. The shortfall was statistically significant for each of these categories, with levels of significance ranging from -2.68 to -6.17 standard deviations.

Dr. Drogin found that for the ten hourly jobs with at least 50 promotions into them, there was a shortfall in African American promotions into 9 out of the 10 jobs. That shortfall was statistically significant for 5 of the 10 jobs.

Dr. Baker's rebuttal was unpersuasive. Her promotion analysis relies, as her initial assignment analysis relies, on the information she was given by Lufkin's management. The court is not persuaded that the information is accurate or reliable. Dr. Baker claims that her use of the actual bid sheets is a superior metric, but that argument ignores a substantial part of the plaintiffs' argument. Because African-Americans are systematically discouraged from bidding on jobs, are discouraged from taking

promotions awarded through the bid process, and have difficulty getting assignments that will help them acquire the skills needed for further promotions, analyzing the actual bid sheets merely incorporates several tainted variables. The parties have also debated whether all bid sheets have been produced and whether Lufkin's resulting database is accurate. Though there is some dispute as to whether so-called "automatic" promotions listed in the CBA should be counted, there is sufficient evidence to find discrimination in promotions regardless. After considering the evidence in its totality, the court finds Dr. Baker's reliance on tainted data in support of questionable conclusions unconvincing.

b. Salaried Promotion Statistics

In addition to the promotion disparity in the hourly ranks, a statistically significant shortfall in promotions to the salaried workforce also exists. Between 1994 and 2002, Lufkin awarded 386 promotions from hourly positions to salaried jobs. Based solely on the proportion of African-Americans in the workforce, blacks would be expected to have received 42.85 promotions. In actuality, Black workers received only 34 promotions. The shortfall of 8.85 promotions is statistically significant at the .05 level. Drs. Drogin and Baker again disagreed on the appropriate model; Dr. Drogin looked at all salaried workers, while Dr. Baker looked at each division separately. The statistical significance is not as robust here, but that is in part an artifact of the smaller sample size. Dr. Drogin's decision to aggregate the data serves his ends, just as Dr. Baker's decision to refine the data serves hers. After hearing the

testimony offered at trial, the court finds Dr. Drogin's analysis more persuasive.

3. Compensation (Income) Statistics

The net result of Lufkin's discriminatory practices is a significant shortfall in income for black employees. According to Dr. Drogin, the average pay of blacks for every EEO category and almost every year is below the relevant average pay of whites. That pattern holds true even after controlling for seniority, EEO category, part-time/full-time status, and shift. Given the court's finding above that Lufkin discriminates in its initial assignment and promotion processes, any other conclusion would be surprising. As an example, blacks in skilled craftsman positions[8] are disproportionately concentrated in the lower-paying jobs. They hold 24% of the positions that pay less than the category average of $13.31 an hour, but only 7.8% of the positions paying more than $13.31 an hour.

Dr. Drogin found shortcomings in most every time period, EEO category, and division, even after controlling for year, time in job, shift, full-time/part-time status, EEO category, and end-of-year employment status. Those aggregate numbers were 21 cents/hour in both 1994 and 1995; 23 cents/hour in 1996; 28 cents/hour in 1997; 34 cents/hour in 1998; 38 cents/hour in 1999; 42 cents/hour in 2000; 45 cents/hour in 2001; and 54 cents/hour in 2002.

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[8] EEO category 6, the highest level of blue-collar production jobs at Lufkin

Dr. Baker criticized Dr. Drogin's decision not to control for job classification. According to Dr. Baker, once job classification is considered, the compensation disparity disappears. That finding is absolutely correct and fundamentally meaningless. Essentially, Lufkin claims that workers in the same job classification get the same pay.

That conclusion is utterly unsurprising; it simply means that employees performing exactly the same job were paid exactly the same wage. Plaintiffs have never claimed nor suggested otherwise. What plaintiffs actually argue, and what this court finds, is that Lufkin's discrimination in initial assignments and promotions has concentrated blacks in lower-paying jobs. Job classification is thus a variable that is tainted by the discrimination already found in initial assignments and promotions. Dr. Baker's criticism is not relevant to that finding, much less dispositive. Dr. Baker's decision to incorporate job classification into her analysis renders her results largely irrelevant to the claims before the court.

D. Calculating Back Pay

1. Relevant Considerations

In order to maintain their class status under Rule 23(b)(2), plaintiffs have abandoned all individual claims and compensatory damages. Plaintiffs have not addressed, and the court need not consider, individual claims for damages. However, because plaintiffs proved their claim of disparate impact employment discrimination, class members are entitled to back pay. Although the court is convinced that Lufkin

discriminated against black employees with regard to initial assignments and promotions, there is no way for the court to identify individual employees deserving of back pay. It is impossible for this court to say which Foundry employees should have been assigned to a better division, or whether an employee assigned to the Trailer division actually deserved a spot in Power Transmission. There is no practical way to separate the employees who were discouraged from bidding on a job from those who were simply not interested. There is no efficient way to decide which employees were encouraged not to accept a promotion from the employees who decided that they did not want a new job. There is no way at all to determine which employees were harmed by a lack of promotion-enhancing on-the-job training

The court is mindful of the Fifth Circuit's admonition to avoid uniform class-wide remedies whenever possible. But in this case, given the facts before it, the court finds that a formula-driven approach is necessary. The number of class members and the inherent uncertainty of the individual claims contraindicates the use of a special master or "mini-hearings." However, the court need not resort to a single per-capita award for all class members. There are a few objective qualifications that will serve to increase or decrease each class member's award of back pay.

The plaintiffs' claim based on initial assignment states that workers in the Foundry were injured by being channeled away from the more lucrative opportunities in the Trailer, Oilfield, and Power Transmission production divisions. Obviously, those

black employees who were assigned to the Power Transmission division (which holds the highest-paying jobs with the best general working conditions) can have no cause for complaint. The statistical evidence does not support a claim that workers were channeled into the Trailer or Oilfield divisions (nor do plaintiffs make such a claim). Black employees assigned to the Foundry are thus a distinct subgroup of the class, and their back pay should reflect the fact that they were harmed by discrimination in both initial assignments and promotions. More than 90% of Lufkin's black Foundry workers met the "minimum" qualifications to work in other divisions and the court will not attempt to differentiate workers who were qualified to work in other divisions; the evidence produced at trial indicates that the requirements to work in the other divisions have been flexible over the class period. The court thus cannot say with any reasonable degree of certainty whether or not any given individual would have been suitable for employment in another division.

Just as Foundry workers were particularly harmed, some employees could not have been injured during the class period. Some workers presumably reached the absolute top of the pay scale for their respective division for their entire tenure during the class period. The court wishes to make clear that it suspects the group of affected employees is relatively small. It is not sufficient that the worker was merely at the top of the pay scale for a given job classification; the evidence suggests that many promotions resulted in a temporary pay cut, as employees at the top of a classification's pay range to take jobs with lower immediate pay but higher maximum pay. The court is referring to those workers making more than any

other hourly worker in each division, regardless of category. For those employees, there was nowhere higher to go. Even after the effects of discrimination, those employees had reached the pinnacle of the ladder; for the period in which they occupied those positions and that pay grade, they could not have been harmed by discrimination within the hourly ranks. Those employees were affected by discrimination in promotion to salaried positions. Sylvester McClain is an example; according to the court's perusal of the CBA,[9] the position of Inspector pays as much as any other position in the Trailer division. Mr. McClain in particular has been harmed by being demoted from a salaried position, but plaintiffs' theory of disparate impact does not allow the court to make special allowances for individual plaintiffs. The court can only include Mr. McClain in the group of employees entitled to receive some recompense for discrimination in promotions to salaried positions.

2. Numerical data

The court is of the opinion that some of the disparities in hourly compensation are the result of discrimination in initial assignment, while others are the result of discrimination in promotions. The income disparities found by Dr. Drogin after controlling for EEO category, time in job, shift, full-time/part-time status, and active/non-active status represent suitable calculations for the effects of discrimination. Because there is no data on the period after 2002, the court

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[9] The court's reading of the CBA may be incomplete or inaccurate and is not meant as an authoritative statement.

chooses to use the 2002 numbers. This decision may be unfair to the plaintiffs, since the trend of disparities was uniformly upwards, but the court sees no alternative given the data before it. There is also a probability that Lufkin cleaned up its act in 2003 and there is no longer any income disparity, but the court considers that conclusion unlikely. Pre-judgment interest is to be awarded in the amount of 5%, compounded annually.

The court orders that back pay is to be awarded in the following manner: Foundry workers, who constitute about a third of the class members, are entitled to back pay equal to 133% of the disparities found by Dr. Drogin, as listed below. That sum will compensate them for discrimination in both initial assignments and promotions. All other employees will receive 83 1/3% of the disparities found by Dr. Drogin. That sum will compensate them for discrimination in hourly promotions.

The disparity in salaried promotions resulted in an absence of one such promotion per year. The average salaried workers earns more money than the average hourly worker, with greater potential for advancement and different working conditions. There is no way to say which workers should have been promoted into which positions; a worker earning a promotion to secretary might gain nothing in monetary terms, but at least one white hourly worker received a promotion to a position that paid a six-figure salary. Since the court can not value the missing promotions with any significant precision, it finds that each missing salaried promotion was worth an additional 2

cents/hour to each class member who worked during the year that the promotion was not awarded.

Class members with salaried positions will receive $ 600 per year. Salaried class members receive a smaller percentage of the relevant income disparity and a single value for each year to reflect the lesser statistical significance of the relevant regression analysis. The court is less certain that it can gauge the effects of discrimination on salaried employees. Although the court is convinced that discrimination occurred in both the hourly and salaried ranks, that compensation disparity may result in part from independent variables other than racism such as education, training, and prior experience. In the absence of evidence that those variables are not partially responsible for the compensation disparity, the court chooses to limit the award made to salaried employees to an amount roughly comparable to that received by the hourly employees.

The court offers these numbers as its calculations of the formulas described above (these numbers do not include interest).

For employees in the Foundry:

_ 30 _ cents per hour worked in 1994.

_ 30 _ cents per hour worked in 1995

_ 63 _ cents per hour worked in 1996

_ 39 _ cents per hour worked in 1997

_ 47 _ cents per hour worked in 1998

_ 53 _ cents per hour worked in 1999

_ 58 _ cents per hour worked in 2000

_ 62 _ cents per hour worked in 2001

_ 74 _ cents per hour worked in 2002

_ 74 _ cents per hour worked in 2003

_ 74 _ cents per hour worked in 2004

_ 74 _ cents per hour worked between January 1, 2005 and [date of judgment] 2005

For class members in hourly positions in all other divisions:

_ 20 _ cents per hour worked in 1994.

_ 20 _ cents per hour worked in 1995

_ 21 _ cents per hour worked in 1996

_ 25 _ cents per hour worked in 1997

_ 30 _ cents per hour worked in 1998

_ 34 _ cents per hour worked in 1999

_ 37 _ cents per hour worked in 2000

_ 40 _ cents per hour worked in 2001

_ 47 _ cents per hour worked in 2002

_ 47 _ cents per hour worked in 2003

_ 47 _ cents per hour worked in 2004

_ 47 _ cents per hour worked between January 1, 2005 and January 13th, 2005

The court considered and rejected the possibility of allowing a special master to determine damages; the size of the class and the complexity of the issues weigh against "mini-hearings" for each class member. Any gains in precision would likely be dwarfed by the expense and difficulty of individual hearings for more than 700 plaintiffs.

V. Relief For the Plaintiff Class

The factual data forms a probative symmetry with the statistical data, leaving the court convinced that Lufkin Industries discriminated against African-American employees when awarding initial assignments and promotions. That discrimination resulted in a corresponding shortfall in African-American wages and salaries. To remedy that discrimination, the court orders back pay to the groups listed above and in the amounts listed above.

The court also enjoins and orders Lufkin Industries to cease and desist all racially biased assignment and promotion practices. Specifically, the court orders Lufkin Industries to: cease and desist any and all channeling of black applicants to the Foundry or Trailer divisions; make formal training equally

available to all employees regardless of race and ensure that formal training is not unreasonably withheld; create and implement a program to ensure that black employees receive more on-the-job training through daily work assignments equal to all white employees without exception which will develop the skills and abilities needed for promotions; and create and implement a program to ensure that black employees receive an equitable proportion of promotions in keeping with their representation in the Lufkin Industries work force. Promotions must be without regard to race, consistent with this order and the Collective Bargaining Agreement with the various unions. The court finds that increased training in human resources and equal employment opportunity law would be a very well-advised first step. As it has discussed with the parties, the court will probably appoint a monitor to oversee Lufkin's compliance efforts and ensure the smooth implementation of the listed requirements.

The court can enjoin racially based practices, but it realizes that an individual's beliefs, feelings, and privately held racial animus are beyond the reach of the law. The court can therefore do no more - and no less - than to order that initial assignments, promotions, and other benefits must not be based thereon. Lufkin Industries is to take all necessary steps to remedy the effects of its past discrimination and ensure that discrimination does not taint its future decisions on hiring, status of pay, assignment, rates of pay, and promotions.

Damages

The plaintiffs having prevailed, it is ordered adjudged and decreed that the class receive $3,400,139 in back pay, plus post-judgment interest on that amount beginning from January 1, 2005. Post-judgment interest is to be assessed at the ordinary federal rate.

Attorney's Fees

The plaintiffs having prevailed, they are entitled to an award of attorney's fees. 42 U.S.C. § 2000e-5(k). Plaintiffs' counsel has made a request for an amount in excess of $6,000,000 in attorney's fees involving hour rates of $550 per hour for partners in the Goldstein Demchak firm for recovering a well-deserved judgment of $3,400,000 for the class. Ms. Demchak has submitted logs showing (according to her) that she expended in excess of 3700 hours in this case. However, the court finds that the hours logged by her time keeper are excessive and not necessary, nor do they show the usual and customary cost for employment discrimination cases in the Eastern District of Texas's Lufkin division (a city of less than 35,000 people) or Beaumont division (a city of less than 115,000 people).

The fees which are approved and ordered are as follows: no fee is awarded for time spent in the unsuccessful mediation, nor is any fee awarded for Mr. Garrigan's attendance at plaintiff Roald Mark's separate suit against Lufkin Industries. Once that time is removed, the remaining billable hours of all plaintiffs' attorneys are to be reduced by 25%. Ms.

Demchak and Mr. Baller are to receive $350 an hour. Attorneys Burrell, Konecky, and Borgen are to receive $300 an hour. Ms. Rabin is to receive $250 an hour. Paralegal hours are to be billed at $60 an hour. Case clerk hours are to be billed at $50 an hour. Mr. Garrigan is to receive $250 an hour. Mr. Garrigan's paralegal, Ms. Davis, is to receive $75 an hour. Plaintiffs' attorneys are awarded $127,658.60 in taxable costs. Plaintiffs' attorneys are also awarded $840,129.72 in litigation-related expenses.

VI. Conclusion

Because plaintiffs have proven their case for employment discrimination, it is hereby ORDERED that plaintiffs receive all relief stated in this opinion.

SIGNED at BEAUMONT, Texas, on this the 29 day of August, 2005.

/s/
HOWELL COBB
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

D.C. Docket No. 9:97-CV-63

[Filed April 4, 2008]

SYLVESTER MCCLAIN; ET AL)
)
Plaintiffs)
)
SYLVESTER MCCLAIN, on his own behalf)
and on behalf of a class of similarly situated)
persons; BUFORD THOMAS, on his own)
behalf and on behalf of a class of similarly)
situated persons; PATRICK ROSS, on his)
own behalf and on behalf of a class of similarly)
situated persons; MARY THOMAS, on her own)
behalf and on behalf of a class of similarly)
situated persons; EDDIE K MASK, on his own)
behalf and on behalf of a class of similarly)
situated persons; LEROY GARNER, on his own)
behalf and on behalf of a class of similarly)
situated persons; SHERRY CALLOWAY)
SWINT, on her own behalf and on behalf of a)
class of similarly situated persons; WALTER)
BUTLER, on his own behalf and on behalf of a)
class of similarly situated persons; also known)
as A; FLORINE THOMPSON, in her own)
behalf and on behalf of a class of similarly)

situated persons; CLARENCE OWENS, on his own behalf and on behalf of a class of similarly situated persons; also known as C; CLIFFORD R DUIRDEN, on his own behalf and on behalf of a class of similarly situated persons; EARL POTTS, on his own behalf and on behalf of a class of similarly situated persons; ROALD MARK, on his behalf and on behalf of a class of similarly situated persons

Plaintiffs - Appellants-Cross Appellees

v.

LUFKIN INDUSTRIES INC

Defendant - Appellee-Cross Appellant

Appeals from the Untied States District Court for the Eastern District of Texas, Lufkin

ON PETITION FOR REHEARING

Before JONES, Chief Judge, and HIGGINBOTHAM and CLEMENT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing are denied.

ENTERED FOR THE COURT:

/s/ Edith H. Jones

United States Circuit Judge

REHG-13

104

(2)

No. 08-29

FILED
AUG 6 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

LUFKIN INDUSTRIES, INC.,

Petitioner,

v.

SYLVESTER MCCLAIN, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Petitioner presents no "compelling reasons" for the Court to grant its Petition for a Writ of Certiorari ("Petition"). *See* Supreme Court Rule ("Sup. Ct. R.") 10. The Fifth Circuit's unanimous panel Opinion, which is fact-bound and announces no new or extended legal principles that might set precedent for other cases, does not merit review by this Court.[1] Petitioner does not assert that the Opinion is in conflict with a decision of another Court of Appeals or that the Fifth Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10 (a), (c). Although Petitioner contends that the Fifth Circuit's Opinion conflicts with Section 703(h) of Title VII of the Civil Rights Act of 1964 ("§ 703(h)"), 42 U.S.C. § 2000e-2(h), and Supreme Court case law, the purported conflicts are illusory.

Petitioner's contentions are based upon a misreading of the case law and distortions of the Fifth Circuit's holding and the facts as found by both courts below. In its attempt to identify an issue meriting this Court's attention, Petitioner seriously misrepresents the opinions below. There is no issue here of disturbing the well-settled protection afforded bona-fide seniority systems under § 703(h). Petitioner's hyperbolic assertion that the decision below will intrude

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[1] The Fifth Circuit's Opinion was authored by Chief Judge Edith H. Jones, and joined by Judges Patrick E. Higginbotham and Edith Brown Clement.

upon the collective bargaining process for Petitioner, much less other employers, is misguided. Plaintiffs did not seek, and neither court below ordered, any change in Petitioner's seniority system or collective bargaining agreement. As the courts below found, based on a rigorous review of the factual record, Petitioner did not follow its seniority system regularly or honestly, but routinely exercised its discretion to violate seniority rights in a way that disadvantaged African American workers in violation of Title VII.

The Fifth Circuit followed and applied well-settled case law regarding multi-part employment decision-making systems whose parts are not capable of separation for review. The trial court's factual findings that (1) Petitioner did not follow its seniority system; (2) the exceptions to seniority swallowed the rule and (3) it was not possible to separate out seniority-based promotions from those based on Petitioner's discriminatory application of qualification, attendance or other rules because (a) Petitioner's use of seniority was subject to its decisionmakers' discretion, (b) seniority was not the deciding factor in so many cases and (c) so many promotion records were missing or inaccurate, and the Fifth Circuit's affirmance of these findings, are all well grounded in the record.

Petitioner's second question, its challenge to the shortfall/back pay period considered by both courts below, also is not worthy of review. The resolution of this question based on detailed and somewhat unclear facts, with findings thereon by the two courts

below, is of no general importance to the development of the law or to other cases.

None of the criteria warranting this Court's review is present in this case. The questions presented are intensively factual, and the fact-based decisions of the courts below are not appropriate for review. The Petition therefore should be denied.

COUNTER-STATEMENT OF THE CASE

This case involves claims by a certified class of approximately 700 African American current and former employees of Petitioner Lufkin Industries, Inc. ("Lufkin") that Lufkin discriminated against them on account of race in making initial job assignments and promotions. (Record ("R") 87-98) Specifically, plaintiffs alleged that Lufkin's initial job assignments and promotion practices were highly subjective and resulted in unlawful disparate impact on the plaintiff class. Following a protracted pre-trial history that included two separate evidentiary hearings on class certification (R 650-51, 1002-5, 1012-3), two unsuccessful interlocutory appeals by Lufkin to the Fifth Circuit (R 5998, 9676-7), a two-year mediation that ultimately failed (Appendix to Defendant's Petition for Writ of Certiorari ("Pet. App.") 37a-39a) and extensive discovery, the case was tried. At the conclusion of the bench trial, at which a total of 25 witnesses testified and 163 exhibits, including the reports of the parties' statistical and sociological

experts, were admitted into evidence, the district court issued a 39-page Memorandum and Opinion finding that Lufkin's initial assignment and promotion practices lacked objective criteria or guidelines allowing Lufkin's managers – who are nearly exclusively white – to make these decisions using their own subjective criteria, resulting in unlawful disparate impact on Lufkin's African American employees in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000(e), *et seq.* (R 9410-48) Following further proceedings on matters related to remedies and other issues not relevant to the questions presented by Petitioner, the district court issued an Amended Final Judgment that reiterated verbatim its liability findings. (Pet. App. 37a-82a) On appeal and cross-appeal, the Fifth Circuit affirmed in part, reversed in part and remanded the case to the district court for further proceedings.[2] (Pet. App. 1a-36a)

The promotion practices at issue in this case are complicated.[3] There were substantial factual disputes below about the nature of the practices and their

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[2] On the matters raised by Lufkin in its Petition, the Fifth Circuit affirmed *in toto*.

[3] Lufkin's initial assignment practices are no longer at issue in the case as the Fifth Circuit found that they were not encompassed by the charge filed by named plaintiff Sylvester McClain with the Equal Employment Opportunity Commission and, therefore, plaintiffs had not exhausted the requisite administrative remedies for bringing a claim challenging the practices. (Pet. App. 5a-12a)

impact on African American employees; the district court, relying in part on credibility determinations, resolved the disputed factual issues in Respondents' favor. The Petition reiterates Lufkin's factual contentions on these points, which were explicitly rejected by both courts below, and distorts the courts' resolution of the factual disputes. Respondents, therefore, detail below the extensive factual findings made by the district court which were accepted by the Fifth Circuit.

1. The Two Lower Courts' Findings as to the Subjective Nature of Lufkin's Promotion Practices

In describing Lufkin's "promotion process for posted hourly jobs," Petitioner pretends to write on a blank slate. *See* Petition at 5-6. Petitioner ignores that the district court found as fact that Lufkin's promotion process was not as it is described in the Petition. (Pet. App. 58a ("Lufkin's official [promotion] policies describe . . . a color-blind process with no room for individual bias. Unfortunately, the evidence and testimony given before the court do not support Lufkin's claims.")) Although the court recognized that "[s]eniority is the main criterion" for promotions of hourly employees, it found that "ability is also a necessary qualification" and "Lufkin has established several other rules that affect promotions." (Pet. App. 42a-44a) The court found that the "ability" exception to seniority "appears to trump all other considerations." (Pet. App. 44a) Citing testimony of class members and

Lufkin's own managers and documentary evidence, including the Collective Bargaining Agreement ("CBA"), the court found that "Lufkin has many 'objective' requirements that it cites as binding rules, but the evidence before the court demonstrates that Lufkin's managers have considerable discretion in applying or ignoring those rules." (Pet. App. 62a) *See also* Pet. App. at 43a-44a ("some [promotion] criteria are objectively verifiable. . . . Other criteria are left to the satisfaction of individual managers.") The district court found that, as a result of this subjective decisionmaking, Lufkin's white employees are "selected and groomed for advancement" while African American employees are "more likely to be placed in dead-end positions." (Pet. App. 61a)

The Fifth Circuit affirmed these core findings of fact and in doing so, cited additional record evidence supporting them, including testimony from class members and admissions of Lufkin's Vice President of Human Resources Paul Perez, and other witnesses called by Lufkin. For example, the Fifth Circuit noted that:

> Plaintiffs offered evidence that promotions are not rigidly awarded according to seniority. Class members Sylvester McClain and Florine Thompson testified that they were personally bypassed for promotion in favor of a less senior white employee. Plaintiffs presented additional evidence that approximately half of all promotions were not awarded to the most senior bidder.

(Pet. App. 14a) The Fifth Circuit also noted that the CBA "contains an ability clause that allowed Lufkin to fill positions on the basis of ability, regardless of seniority. The evidence indicates that ability determinations were not governed by objective standards. Paul Perez, Lufkin's Vice President of Human Resources, agreed that the ability determination was subjective." (Pet. App. 14a-15a)

The Fifth Circuit also cited, with approval, plaintiff McClain's testimony "that supervisors did not always truly evaluate ability when awarding promotions under the ability clause, but simply gave the position to the candidate they favored." (Pet. App. 15a) Likewise, the Court noted that "Billy Webb, the union's chief spokesman [who was called by Lufkin], testified that the union had taken issue with the ability provision in past contract negotiations because it did not think that the ability clause was always administered fairly." (Pet. App. 15a)

The Fifth Circuit further noted that "[t]he CBA also provides for a ten-day trial period following promotion. According to the testimony of one of its managers, Lufkin has no written guidelines or formal tests for determining which employees pass this trial period," (Pet. App. 15a), and "Plaintiffs also offered evidence that Lufkin permitted its managers to apportion training opportunities subjectively, a process that disadvantaged black employees who sought promotions." (Pet. App. 15a)

Again citing the testimony of Lufkin's Vice President of Human Resources, the Fifth Circuit observed that:

> Perez testified that the CBA does not govern employees' daily work assignments, and he acknowledged that daily job assignments are not made on the basis of seniority[,] . . . there are no written policies determining who is to receive on-the-job training, and Lufkin does not track how such training is allocated among employees."

(Pet. App. 15a) The Fifth Circuit also cited with approval additional testimony of Mr. McClain that:

> [W]hite employees were given more training in areas that were relevant to the jobs he sought. McClain explained that when 'white managers and supervisors . . . see a man they want to put on a particular job, . . . they'll tap him' for training after his shift, or for external training. According to McClain, the employee who received the extra training would be the most qualified and would therefore receive the promotion once the job became available.

(Pet. App. 15a-16a)

In the same vein, the Fifth Circuit recited that the "district court also heard testimony that Lufkin's allegedly objective measures for determining which employees were eligible to bid, such as attendance and discipline records, are subject to variance and manipulation," (Pet. App. 16a), and cited the testimony of class

members Thompson and McClain "that the system was manipulable. If an employee was absent or tardy and the supervisor did not want the employee to lose credit, Thompson stated that the supervisor could non-schedule the employee or use the employee's vacation days to skew the records." (Pet. App. 16a) The Fifth Circuit also cited the testimony of Steve Reynolds, a Lufkin supervisor, who testified that, with respect to discipline, "there are no written criteria for determining when a rule violation should be 'written up.' He stated that this decision is left to individual supervisors."[4] (Pet. App. 16a)

As to the district court's fundamental finding that Lufkin's promotion practices were subjective, the

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[4] The district court also found that Lufkin's promotion practices for salaried employees were subjective, and that the company filled salaried positions with "anyone deemed suitable by Lufkin management." (Pet. App. 44a) The court found that qualified African Americans were not promoted or took longer than whites to be promoted to salaried positions, despite their qualifications. (Pet. App. 63a-64a)

The Fifth Circuit accepted these findings without qualification:

> The evidence also supported that Lufkin engaged in subjective decision making when awarding promotions in the salaried ranks. Salaried positions are not governed by the CBA, and company managers admitted that they were unaware of any guidelines, criteria, or documentation for the process of making promotions to salaried positions. Rather, most promotions in the salaried ranks are awarded through an interview process.

(Pet. App. 16a)

Fifth Circuit, properly recognizing the fact-finding province of the district court, concluded:

> In light of this evidence, we are not left with the definite and firm conviction that the district court erred in finding subjective decision making in Lufkin's promotion system. *See United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). Although Lufkin offered some testimony during the bench trial that would tend to refute the court's finding, it was within the province of the district court to accord this testimony less credibility than that of the class members and their experts. 'The reviewing court oversteps the bounds of its duty under [Federal] Rule [of Civil Procedure] 52(a) if it undertakes to duplicate the role of the lower court.' *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985). Accordingly, we cannot say the court's finding of subjective decision making in promotions amounted to clear error."

(Pet. App. 17a)

2. The Two Lower Courts' Findings as to the Appropriateness of Plaintiffs' Statistical Methodology in Analyzing Promotions

The district court acknowledged and discussed the proper standards and burdens for considering statistical evidence in a Title VII disparate impact case. (Pet. App. 52a-55a) Recognizing "the necessary primacy of statistical evidence" in a class action based on the adverse impact theory, (Pet. App. 54a-55a), like

this case, the court made detailed and specific fact findings on the statistical evidence of hourly and salaried promotions. (Pet. App. 64a-72a) As to each, the court found as fact that there were statistically significant disparities between white and African American employees which could not be explained by race-neutral factors. Moreover, on each set of positions, the court carefully considered the parties' experts' competing analytical methods and their validity, as well as their credibility, in light of the evidence about Lufkin's actual practices, and found that the analyses and conclusions plaintiffs presented were well supported and credible, while those of Lufkin were flawed. (Pet. App. 68a-71a)

In particular, the district court credited plaintiffs' expert Dr. Drogin's conclusions. (Pet. App. 67a-71a) Specifically, the court found that, to a statistically significant degree, African Americans received disproportionately fewer promotions than did whites, and fewer than would have been expected in a race-neutral promotional system, for both hourly and salaried positions. (Pet. App. 68a-71a, Record Excerpts of Plaintiffs-Appellants and Cross-Appellees ("RE") 172) This disparity in promotions resulted in a "shortfall" of 127 fewer African American promotions to hourly jobs than expected, with a statistical significance at the level of 7.61 standard deviations, or less

than one chance in ten trillion of random occurrence.[5] (RE 151, 158, 159, 160)

Lufkin and its expert Dr. Baker, attempted to show, but failed to convince the court, that the plaintiffs' promotion analysis was erroneous in method and result. Their basic critique of Dr. Drogin's analysis was that he relied on carefully constructed "availability pools," consisting of potential applicants with at least equal length of service and the same prior positions as those of the employees actually promoted by Lufkin. (RE 157-8, Transcript of Bench Trial ("RT") Dec. 10, 2003 at 62:9-64:3) Lufkin claimed the proper analysis should have been based on its own selective assortment of incomplete job postings, bid sheets, and promotion records. (Defendant's Trial Exhibit ("DX") 1 at 14) The court found and explained why it was not proper, or even possible, to rely on those records or to follow that analytical approach: Lufkin's underlying data was not shown to be accurate or reliable; moreover, it covered less than half the number of promotions, for reasons Dr. Baker was at a loss to explain, and it could not be determined how the missing information might have changed the result. (Pet. App. 69a-71a, RE 157, RT Dec. 10, 2003 at 65:8-70:17) In

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[5] As to salaried positions, with many fewer promotions to analyze, the court found a statistically significant shortfall of African American promotions, at the .05 level, thereby meeting the statistical convention for finding significance. Recognizing that the statistical significance was less robust due, in part, to sample size, the court found plaintiffs' analysis "more persuasive." (RE 151, 163, Pet. App. 70a-71a)

addition, the court found that Lufkin's approach ignored the effects of its managers' discriminatory actions in discouraging African American employees from seeking or accepting promotions,[6] thereby incorporating tainted data, skewing the "actual" promotional data Dr. Baker relied on. (Pet. App. 69a-71a, RT Dec. 10, 2003 at 209:1-210:4, 277:24-278:4)

As an alternative explanation for the racial disparity in promotions, Lufkin attempted to prove that an objective factor – seniority – governed promotions in hourly positions. (R 4791 at ¶ 102) However, statistical evidence showed that in fact less than half of promotions to hourly positions subject to the CBA were awarded to the most senior bidder. (RT Dec. 10, 2003 at 81:17-24, 83:25-84:9, 254:22-255:8, 281:16-23) The court found that Lufkin's many discretionary exceptions to the seniority rule, as well as its discriminatory allocation of training opportunities and manipulation of the "qualification" standard, undermined the rule of seniority in determining promotions. (Pet. App. 43a-44a, 61a-65a) In addition, the court noted that many bid sheets that should have been analyzed were missing from Dr. Baker's analysis, and it found Dr. Baker's approach defective because it failed to take into account the facts that "African Americans are systematically discouraged from bidding and from taking promotions, and have

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[6] The court found that these were routine practices at Lufkin. (Pet. App. 61a-63a)

difficulty getting training assignments." *Id.* The court found plaintiffs' expert's explanations and methods were valid, and rejected those offered by Lufkin. Specifically, the court found:

> Dr. Baker's rebuttal was unpersuasive. Her promotion analysis relies . . . on the information she was given by Lufkin's management. The court is not persuaded that the information is accurate or reliable.

(R 11996, Pet. App. 69a) The court also found "Dr. Baker's reliance on tainted data in support of questionable conclusions unconvincing." (Pet. App. 70a)

On appeal, Lufkin renewed its argument, now repeated for the third time in its Petition, that its promotion practices were capable of separation for analysis. The Fifth Circuit carefully considered and firmly rejected each of Lufkin's arguments that the district court abused its discretion in rejecting Lufkin's alternate explanations of how plaintiffs could have separately analyzed Lufkin's promotion practices. First, the Fifth Circuit considered and rejected Lufkin's argument that "plaintiffs' expert could have separated the challenged employment practices from its legitimate seniority system" and that plaintiffs' expert "included in his analysis numerous promotions that contributed to the statistical shortfall in black promotions, even though these jobs were indisputably awarded to the most senior candidate," noting:

> This argument ignores the district court's finding that Lufkin affords management

> considerable discretion in deciding whether to follow seniority in promotions. Plaintiffs could not statistically analyze the actual practice they challenge – subjective and discretionary application of the seniority provisions – by excluding promotions based on seniority. Seniority, the court found, was likely to have been irrelevant to the promotion.

(Pet. App. 19a)

Next, the Fifth Circuit considered and rejected Lufkin's contention that "plaintiffs should have separated out instances in which candidates were properly denied promotions because of unsatisfactory attendance," observing:

> This argument, too, runs afoul of the [district] court's finding that managers have substantial discretion in applying attendance rules. In such a system, a denial of promotion for poor attendance is not helpful to Lufkin where promotions may also have been awarded following non-uniform interpretation of employee attendance rules.

(Pet. App. 20a)

Lastly, the Fifth Circuit considered and rejected Lufkin's contention that its "'paper bid sheets provided additional information that plaintiffs could have separated for analysis,'" noting:

> To the contrary, the district court rejected the bid data, which Lufkin prepared for purposes

> of this litigation, as unreliable and incomplete; ample evidence supports this finding.

(Pet. App. 20a)

The Fifth Circuit concluded that "Lufkin has not suggested any viable way, consistent with the [district] court's findings, in which the plaintiffs could have separated the promotion criteria for review nor has it shown the district court clearly erred in so finding." (Pet. App. 20a) This constitutes an overall finding of fact demonstrating that Petitioner's basic factual contention cannot find support in the record.

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Between the Fifth Circuit's Opinion and § 703(h).

Petitioner does not contend that the Fifth Circuit's Opinion creates any circuit conflict or that the Fifth Circuit decided an important federal question that has not been settled by this Court. Instead, it hypothesizes a non-existent conflict between the Fifth Circuit's Opinion and § 703(h) by offering a strained and misleading argument that misreads the case law and distorts the Fifth Circuit's holding and the factual findings of both courts below. At its heart, the Petition seeks a merits-based review of factual findings made by two lower courts. To accept Petitioner's arguments, this Court "would be forced to disregard [its] repeated pronouncements that it 'cannot undertake to review concurrent findings of fact by two

courts below in the absence of a very obvious and exceptional showing of error.'" *Berenyi v. Dist. Dir., Immigration and Naturalization Serv.*, 385 U.S. 630, 670 (1967), citing *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949). As explained in *Berenyi*:

> The policy underlying the 'two-court' rule is obvious. This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues. When, as here, resolution of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force.

385 U.S. at 636.

Petitioner's arguments fail for these and the reasons discussed below.

A. Section 703(h) Is Not Implicated in This Case.

Petitioner's invocation of § 703(h) is misplaced. Notably, plaintiffs did not seek, and neither court below ordered, any change in the seniority system.[7]

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[7] Lufkin's contention that "[n]either the district court nor the Fifth Circuit explicitly addressed § 703(h), which Lufkin argued insulated seniority-based promotions from the disparate impact claim," Petition at 9, is misleading. Lufkin argued in the

(Continued on following page)

Plaintiffs contended, and the courts below found, that "Lufkin's subjective practices and policies disparately impacted its black employees." (Pet. App. 58a). Thus, Lufkin's reliance on *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), and other cases holding that proof of discriminatory intent is a necessary element of Title VII actions challenging seniority systems, *see* Petition at 13, 16, is misplaced for the simple reason that plaintiffs did not challenge Lufkin's seniority system as the cause of the disparities in promotions of African American workers. Nor did plaintiffs seek any injunctive relief that would alter Lufkin's seniority system. (Pet. App. 42a-44a)

In a feeble attempt to elevate its disagreement with the unanimous factual findings of two courts and four judges below to one worthy of this Court's review, Lufkin trots out a parade of horribles it says could result from the Fifth Circuit's ruling, including the fanciful prediction that it "will compel employers to re-evaluate their use of seniority systems to award

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district court and Fifth Circuit that "[b]y not excluding promotions based on departmental seniority, plaintiffs included in their analysis decisions which are lawful and which may explain any disparity alleged by Plaintiffs." Lufkin Industries' Brief of Appellee/Cross Appellant at 35-36. In fact, both the district court and the Fifth Circuit expressly addressed this contention by finding that it was not possible to separate seniority-based promotions from those based on discriminatory application of myriad rules and criteria because whether to consider seniority was a function of Petitioner's discretion, seniority was not the deciding factor in so many cases and Lufkin's promotion records were incomplete and inaccurate. (Pet. App. 17a-20a, 42a-44a)

benefits and thereby impinge on the freedom to bargain § 703(h) was meant to protect." Petition at 14. That is nonsense. The rulings below turn on the specific and unique facts of this case and have limited application. What plaintiffs challenged in this case is not Lufkin's seniority system but Lufkin's subjective decisionmaking – implemented, as the courts below found, without regard to seniority rights and in a manner that disadvantaged African American workers. The courts' factual findings on that issue provide the basis for the liability finding against Lufkin. (Pet. App. 13a-17a)

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982), which Lufkin cites, is inapplicable here. *Patterson* dealt with appropriate remedies where an employer adopts a discriminatory seniority system. *See id.* at 70 (finding that such relief "would very likely include an injunction against the future application of the system and backpay awards for those harmed by its application."). Here, plaintiffs did not challenge Lufkin's seniority system as discriminatory; they challenged Lufkin's subjective decisionmaking which departs from and distorts the application of seniority. Furthermore, the courts below found that Lufkin did not follow its seniority system; managers had considerable discretion to, and did, ignore it, and the exercise of that discretion had an adverse impact on African American workers. (Pet. App. 42a-44a) Additionally, plaintiffs do not seek an injunction against the future application of Lufkin's seniority system; they seek to enjoin the unfettered subjective

practices Lufkin employs in making promotion decisions that depart from the seniority provision.[8] Finally, the back pay that will be awarded to the class is based on wage losses African American workers suffered because of promotion disparities which the courts below found resulted from Lufkin's subjective promotion practices. (Pet. App. 72a-73a)

B. The Courts Below Made Factual Determinations – Based on the Specific Facts of the Case – That It Was Not Possible to Separately Analyze Any of Lufkin's Subjective Promotion Practices.

Petitioner cites no case of any court at any level in conflict with the lower courts' fact-bound application in this case of the "not-capable-of-separation-for-analysis" model authorized by the Civil Rights Act of 1991, 42 U.S.C. §§ 2000e-2(k)(1)(B)(i).[9] *See* Petition at

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[8] The issue of appropriate class injunctive relief will be determined by the district court on remand. (Pet. App. 33a) However, prior to the district court's issuance of the Amended Final Judgment, plaintiffs presented their injunctive relief proposals to the district court. None of the proposals sought to enjoin the future application of, or impinged in any way on, Lufkin's seniority system. (Pet. App. 42a-44a) In any event, the injunctive relief that will be, but has not yet been, ordered by the district court on remand, is not ripe for this Court's review.

[9] An exhaustive search by plaintiffs' counsel revealed that this arcane statutory provision has not been invoked in any other case in the Fifth Circuit in the 17 years since its enactment, thus further diminishing the need for this Court to review the application of it by the courts below.

18-21. In seeking to have this Court review whether the promotions Lufkin purportedly made on the basis of seniority could have been separately analyzed, Petitioner asks this Court to ignore factual findings made by the trial judge and unanimously accepted by the Fifth Circuit panel.

The district court's extensive findings of fact on the statistical and expert witness evidence – including whether promotions based on seniority could be separately analyzed – were based on weight and credibility determinations accorded to the parties' experts' testimony and documentary evidence underlying their opinions. The court found that Lufkin's bid sheets and bidding and job award procedures, on which its expert relied, were incomplete, inaccurate, and did not capture Lufkin's actual promotion process. The court found that, while "[i]n theory the posting process is a rigid and inflexible system that ensures the promotion of the most senior qualified person interested in the job," in reality, the process is rife with discretionary factors that negate the supposed objectivity of the process and factors used. (Pet. App. 43a-44a) It also found that, while "some of the criteria are objectively verifiable, . . . [o]ther criteria are left to the satisfaction of individual managers"; the subjectively-applied "ability clause" "trumps" seniority and other eligibility rules and factors subject to discretionary application, such as uncontrolled allocation of training and scheduling opportunities, allow bias to affect promotions. (Pet. App. 43a-44a, 61a-64a) It concluded with the general finding that

"Lufkin's managers have considerable discretion in applying or ignoring those rules," which are "all subject to flexibility and manipulation."[10] (Pet. App. 62a) The court also found that white employees are given "preferential treatment" in obtaining skills and training, (Pet. App. 63a), while "African-Americans are systematically discouraged from bidding on jobs [and] . . . taking promotions awarded through the bid process." (Pet. App. 69a-70a)

The court also questioned "whether all the bid sheets have been produced and whether Lufkin's resulting database is accurate," (Pet. App. 70a), based on Dr. Drogin's finding that bid sheets for over one-half the promotions were missing from Dr. Baker's database, which was prepared by defense counsel for litigation. (RE 157, RT Dec. 10, 2003 at 65:24-67:6, 69:11-22, Pet. App. 69a-70a) Therefore, the court concluded that analyzing these bid sheets would incorporate inaccuracies and "Dr. Baker's reliance on tainted data in support of questionable conclusions [was] unconvincing." (Pet. App. 70a)

The Fifth Circuit properly recognized and gave the required deference due to the fact-findings and credibility assessments of the trial court. (Pet. App. 21a) In affirming the district court's factual findings

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[10] Dr. Drogin reported that, even using Lufkin's proffered database, 1,431 promotions were awarded to a non-senior bidder. (Plaintiffs' Trial Exhibit ("PX") 139, RT Dec. 10, 2003 at 81:12-24, 83:4-16, 254:22-255:16)

discussed above, the Fifth Circuit concluded that "Lufkin has not suggested any viable way, consistent with the court's findings, in which the plaintiffs could have separated the promotion criteria for review nor has it shown the district court clearly erred in so finding."[11] (Pet. App. 20a)

Significantly, Lufkin's argument totally ignores that the district court considered and rejected as inaccurate and unreliable Lufkin's own promotion analysis which it claimed controlled for seniority. (Pet. App. 69a-70a) The Fifth Circuit expressly affirmed this finding, (Pet. App. 21a ("Faced with this battle of experts, the district judge credited the testimony of Dr. Drogin over that of Dr. Baker."), observing that "[a]n appellate court owes great deference to the findings of the trial court with respect to duly admitted expert testimony." (Pet. App. 21a)

In summary, Lufkin fails to meet its heavy burden to make a "very obvious and exceptional showing of error" necessary for this Court to review the unanimous factual findings of the courts below. *Berenyi*, 385 U.S. at 670.

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[11] In fact, Lufkin did not conduct any of the analyses it argued to the Fifth Circuit that plaintiffs "could have" done, *see* 14-16 *supra*, because the records to do so did not exist.

C. The Fifth Circuit's Opinion Does Not Conflict with *California Brewers Ass'n v. Bryant*.

Petitioner half-heartedly suggests that the Fifth Circuit's Opinion conflicts with *California Brewers Ass'n v. Bryant*, 444 U.S. 598 (1980). In that case, the Court held that a seniority system has two components. First, seniority rights are based on "some measure of time served in employment." *Id.* at 606. Second, seniority systems include "ancillary rules that accomplish certain necessary functions, but which may not themselves be directly related to length of employment." *Id.* at 607. Petitioner contends that under *California Brewers Ass'n*, Lufkin's "seniority provisions do not lose their [§ 703(h)] protection because of their use in combination with other factors." Petition at 23.

Petitioner did not raise this argument in either court below and should not be permitted to raise it for the first time in its Petition. *See United States v. Bean*, 537 U.S. 71, 75 n.2 (2002) (holding argument was waived because it was raised "for the first time in his brief on the merits to this Court."). Even so, Petitioner's argument misses the point. As discussed above, plaintiffs did not challenge Lufkin's seniority system and the courts below found as fact that Lufkin's subjective decisionmaking practices, which included broad and unchecked discretion by managers to ignore the seniority system, resulted in statistically significant disparities in promotions of hourly workers. (Pet. App. 42a-44a)

Petitioner's reliance on *California Brewers Ass'n* is ironically misplaced. *California Brewers Ass'n* explains that employment rules are not exempt from Title VII by § 703(h) "simply because those rules are dubbed 'seniority provisions' or have some nexus" to a seniority system. 444 U.S. at 608. Employment rules that give effect to subjectivity or distort a system that would reward longevity – precisely the type of practices challenged by plaintiffs in this case – are outside of § 703(h). 444 U.S. at 609-10. Petitioner's argument is in direct conflict with the rationale of *California Brewers Ass'n*. Furthermore, as discussed above, the courts below also found that there was no way to separately analyze Lufkin's promotion decisions allegedly based on its seniority provision and those based on other factors exclusive of that provision. *See* 14-16 *supra*.

II. There Is No Basis for the Court to Review Lufkin's Challenge to the Shortfall/Back Pay Period Finding of the Fifth Circuit.

Petitioner's second question, presenting its attempt to raise the shortfall/back pay period issue in scarcely over a page of cursory argument, also is not worthy of this Court's review. The resolution of this question, based on detailed and somewhat unclear facts, with findings thereon by the two courts below, is of no general importance to the development of the law or to other cases. Petitioner has not made "a very obvious and exceptional showing of error" to warrant

this Court's review of this question. *Berenyi*, 385 U.S. at 670.

CONCLUSION

For all of the reasons discussed herein, Petitioner has failed to show that the Fifth Circuit's unanimous panel Opinion is worthy of review by this Court. The Petition should be denied.

Respectfully submitted,

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Dated: August 5, 2008